(12)

No. 99-1613-CFX Title: Robert Shaw, et al., Petitioners
v.
Kevin Murphy

Docketed: April 6, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 6 2000	Petition for writ of certiorari filed. (Response due June 6, 2000)
	May 3 2000	Order extending time to file response to petition until June 6, 2000.
	Jun 6 2000	Brief of respondent Kevin Murphy in opposition filed.
	Jun 6 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Jun 20 2000	Reply brief of petitioners Robert Shaw, et al. filed.
	Jun 21 2000	DISTRIBUTED for Conference of September 25, 2000
	Jun 26 2000	X Affidavit in support of motion for leave to proceed in forma pauperis filed.
	Sep 26 2000	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Sep 26 2000	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 16, 2001. **********
	Nov 7 2000	Record filed.
	Nov 13 2000	Joint appendix filed.
	Nov 13 2000	Brief of petitioners Robert Shaw, L.Bearley, M.Mahoney, M.Beeson,and R.S.Day filed.
	Nov 13 2000	Brief amici curiae of Florida, et al. filed.
	Nov 13 2000	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Nov 13 2000	Brief amicus curiae of United States filed.
	Nov 13 2000	LODGING consisting of twenty copies of Incident Reports submitted by counsel for amici Florida, et al.
	Nov 13 2000	Record filed.
	Nov 21 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 5 2000	CIRCULATED.
	Dec 8 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Dec 11 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 11 2000	Brief amici curiae of Legal Aid Society of the City of New

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No. 99-1613-CFX

Entry	Date	Proceedings and Orders
		York, et al. filed.
	Dec 13 2000	Brief of respondent Kevin Murphy filed.
	Dec 29 2000	Reply brief of petitioners Robert Shaw, et al. filed.
	Jan 16 2001	ARGUED.
	Jan 17 2001	Record filed.

Supreme Court, U.S.
FILED

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No. 99-

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution grant a state prison inmate an independent and free-standing right to assist another state prison inmate with a pending court case even if the State supplies other forms of legal assistance to the prison inmate?

PARTIES

The Petitioners are Richard S. Day, Director of the Montana Department of Corrections; and Robert Shaw, Larry Bearley, Michael Mahoney, and Myron Beeson, employees of the Montana Department of Corrections.

The Respondent is Kevin Murphy, an inmate at Montana State Prison.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit that the Ninth Circuit Court entered on November 9, 1999.

OPINIONS BELOW

The three-judge panel of the United States Court of Appeals for the Ninth Circuit filed its Opinion on November 9, 1999, and is reported at 195 F.3d 1121 (9th Cir. 1999). (App. 1). The Ninth Circuit Court of Appeals denied a Petition for Rehearing and a Suggestion for Rehearing En Banc on January 7, 2000. (App. 45). The district court filed an unreported Order on September 10, 1997. (App. 18). The magistrate judge issued an unpublished Order and Findings and Recommendation. (App. 28).

JURISDICTION

The Respondent filed claims under 42 U.S.C. § 1983, before the district court, and federal jurisdiction existed under 28 U.S.C. § 1343. On September 23, 1997, the district court granted the Petitioners' Motion for Summary Judgment and denied the Respondent's Motion for Summary Judgment. Respondent filed a Notice of Appeal on October 23, 1997. Appellate jurisdiction existed under 28 U.S.C. § 1291.

On November 4, 1999, the Ninth Circuit Court of Appeals reversed the district court's Order and remanded the case with instructions to enter summary judgment in favor of the Respondent. Petitioners filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc on November 26, 1999. The Ninth Circuit denied the Petition for Rehearing on January 7, 2000. Jurisdiction over the petition for certiorari exists under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. This case arose when Respondent attempted to communicate with another Montana State Prison (MSP) inmate, Pat Tracy, about Tracy's pending criminal charges. MSP housed Tracy in the prison's high security compound until officials moved him to the maximum security unit after he assaulted correctional officer Glen Galle. The State charged Tracy with criminal felony assault in state district court, and the state district court therefore appointed counsel to defend Tracy against the criminal charges. (App. 49).

Tracy's place of residence at MSP is significant because the prison is a multi-custody correctional facility. It is physically divided into three separate compounds, the low-security compound or "low side," the high-security compound or "high side," and the maximum security compound. MSP houses death row inmates in maximum security, and it houses inmates there who are so disruptive and violent they cannot live in the general prison

population. MSP incarcerated Respondent in the high security compound at the prison. He worked as an inmate law clerk at the prison, and as such, prison policy authorized Respondent to provide legal assistance to high security inmates, but not to maximum security inmates. MSP did not allow Respondent to enter the maximum security unit.

Tracy nonetheless attempted to summon Respondent to the maximum security unit to consult with Tracy about his pending assault charges. The prison denied Tracy's request to consult with Respondent based upon Respondent's high security classification and Tracy's maximum security classification. The prison instead sent a low security inmate law clerk to confer with Tracy. Tracy rejected the approved clerk's assistance. (App. 49).

On February 16, 1995, Respondent wrote Tracy a letter which read as follows:

> Dear Pat:
>
> How ya (sic) doing? I haven't wrote (sic) before now. I been (sic) busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. the (sic) lowside clerks go up there now. that's (sic) why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an overzealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried

> to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen (sic) Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .
>
> Murph

(App. 46).

Petitioner Shaw, a maximum security unit correctional officer, intercepted and read Respondent's letter. Shaw believed the letter constituted insolence, which the prison defines as "words, actions or other behavior which is intended to harass or cause alarm in an employee;" interfered with a due process hearing, which the prison defines in part as "making a false statement of misconduct against . . . staff that could result in disciplinary action;" and comprised a threat to the security or orderly operation of the institution. Shaw charged Respondent

with three disciplinary rule violations, Rule 009, Insolence; Rule 022, Interference with Due Process Hearings; and Rule 025, Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution.

Petitioner Bearley, a MSP disciplinary hearing officer, thereafter conducted a disciplinary hearing on the charges. Bearley found Respondent guilty of violating Rules 009 and 022. He found Respondent not guilty of violating Rule 025. Bearley gave Respondent a suspended sentence of 10 days detention.

2. Respondent filed a complaint in federal district court against Petitioners on October 24, 1995. He alleged that when the prison disciplined him for the content of his letter to Tracy they violated his First Amendment free speech rights and his right to provide other inmates with legal assistance. He also alleged the discipline violated the rights of other inmates to access the courts because it denied them the assistance of an inmate law clerk, and it violated the Due Process Clause because the disciplinary rules were void for vagueness. He asserted these claims under 42 U.S.C. § 1983, with jurisdiction predicated on 28 U.S.C. § 1343(3).

Following discovery, the parties filed cross motions for summary judgment. A magistrate judge issued findings and recommended that the district court grant Petitioners' Motion for Summary Judgment as to the access to the courts claim, but recommended that the court deny the motion as to the other claims. (App. 29). The magistrate judge further recommended the court deny Respondent's Motion for Summary Judgment. (App. 29).

Both parties filed Objections to the magistrate's Order and Findings and Recommendation. The district court granted Petitioners' Motion for Summary Judgment and denied Respondent's cross-motion. (App. 25-26). The court found Respondent was "not acting as an inmate law clerk" when he wrote to Tracy and accordingly enjoyed no special privilege in his correspondence to Tracy. (App. 23-24). The court then analyzed the prison's sanctions and regulations under *Turner v. Safley*, 482 U.S. 78 (1987), and concluded that the prison regulation that censored inmate-to-inmate correspondence was rationally connected to prison objectives of safety, security, and inmate rehabilitation. (App. 25). The court deemed the alternative Respondent proposed, that the prison read, but not censor, his correspondence to Tracy was "unacceptable and would have a dangerous impact on guards and other inmates." (App. 25). It held, finally, that the prison did not violate Respondent's First Amendment free speech rights because any "First Amendment right to assist other inmates is . . . inconsistent with his status as a prisoner and with the legitimate penological objectives of MSP." (App. 24-25).

The Ninth Circuit Court of Appeals reversed the district court. (App. 17). The Court of Appeals concluded that Respondent was acting as an inmate law clerk when he wrote to Tracy, that the First Amendment granted Respondent the right to assist Tracy, that legal advice is entitled to greater First Amendment protections than general correspondence, and that Petitioners' actions were an "exaggerated response" to MSP's legitimate security concerns. (App. 1).

REASONS THE COURT SHOULD GRANT THE PETITION

There are three reasons the Court should grant this petition. *First*, the circuit courts are divided when they assess whether a prison inmate possesses a First Amendment right to assist other inmates with litigation. *Second*, the Ninth Circuit opinion cannot be reconciled with the four decisions of this Court most relevant to the claimed First Amendment right. *Third*, the Court of Appeals' decision directly, and adversely, affects state management and security of prisons.

I. THE NINTH CIRCUIT COURT IDENTIFIED A FIRST AMENDMENT RIGHT FOR A PRISON INMATE TO ASSIST ANOTHER INMATE WITH LITIGATION REGARDLESS OF WHETHER THE LATTER INMATE HAS OTHER ASSISTANCE, BUT OTHER CIRCUIT COURTS REFUSE TO RECOGNIZE SUCH A RIGHT.

The Ninth Circuit found that "inmates have a First Amendment right to assist other inmates with their legal claims. . . . [T]he provision of legal assistance to fellow inmates is an activity protected by the First Amendment." (App. 6, 8 and 9). The court recognized, however, that the ruling conflicts with several other circuits' decisions: *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993); *Gassler v. Rayl*, 862 F.2d 706, 708 (8th Cir. 1988); and *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990). (App. 9-10, fn.6). The Court of Appeals also could have added decisions from the Fifth and Eleventh Circuits. *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996); *Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998). Indeed, the Ninth Circuit stands

alone with its conclusion that prison inmates enjoy a First Amendment right to render legal assistance to fellow inmates.[1] There is good reason for its isolation.

1. The Court of Appeals relied principally upon its prior decision in *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985), to support the conclusion that inmates enjoy a First Amendment right to associate and, by apparent inference, to assist other inmates with legal matters. (App. 6, 8-9). There, a California prison inmate alleged prison staff retaliated against him and transferred him from San Quentin to another correctional facility because he assisted other inmates with their habeas corpus petitions and filed his own lawsuits. *Id.* at 529. The circuit court determined the inmate may be entitled to relief, and utilized the analysis of associational rights in a non-prison case, *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981). In *Owens* the Tenth Circuit found that a government employer may not infringe upon a husband's First Amendment right of association when he assists his wife in a civil rights action. *Id.* at 1379. From that holding in a non-prison case, and the Supreme Court's holding in another non-prison case, *NAACP v. Button*, 371 U.S. 415

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[1] The Seventh Circuit has considered the issue but reached somewhat inconsistent conclusions. The decisions in *Brookins v. Kolb*, 990 F.2d 308 (7th Cir. 1993), and *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), arguably suggest there is a First Amendment constitutional right to give legal assistance, but the court of appeals in *Gometz v. Henman*, 807 F.2d 113 (7th Cir. 1986), and *Kunzelman v. Thompson*, 799 F.2d 1172 (7th Cir. 1986), found there is no right to assist other inmates with legal matters. The Second Circuit discussed the issue but declined to express a view. *Nicholas v. Miller*, 189 F.3d 191, 195 (2d Cir. 1999).

(1963), the *Rizzo* court analogized and determined an *inmate*, possessed the same First Amendment associational rights to assist another inmate with litigation. 778 F.2d at 531-532.

For 14 years the Ninth Circuit cited *Rizzo* for the simple premise that inmates are entitled to due process of law and that prison officials may not retaliate against inmates for litigation activities. *See Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). Now, however, the panel below expanded the holding of *Rizzo* to protect all inmate-to-inmate correspondence of a legal nature under a theory that inmates possess a First Amendment associational right to assist each other with legal actions. (App. 6, 9).

2. The Ninth Circuit's ruling departs from the path charted by five other circuits. This departure arises from a disagreement over just what and whose constitutional right is at issue. Unlike the Ninth Circuit, the other courts of appeals have found the availability of inmate legal assistance grounded in the right of access to the courts which is "one of the privileges and immunities accorded citizens under article 4 of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government for redress of grievances." *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990) (citations omitted). Moreover, the inmate who receives the assistance is the inmate who possesses the right, not the inmate who gives the assistance. "The relevant constitutional protection . . . accrues to the benefit of the prisoner in whose name the lawsuit is filed, not those who assist in the preparation of that lawsuit." *Johnson v. Rodriguez*, 110 F.3d 299, 311 (5th Cir. 1997). *See also Gibbs*

v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993); *Abbott v. Meese*, 824 F.2d 1166, 1169 (D.C. Cir. 1987) *overruled on other grounds sub nom. Thornburgh v. Abbott*, 490 U.S. 401 (1989).

A sampling of the decisions from the other circuits underscores the nature, and seriousness, of their disagreement with the result here. In, *Gassler v. Rayl*, 862 F.2d 706, 707-708 (8th Cir. 1988) the court observed that "[t]here is . . . no right to be or to receive legal assistance from a jailhouse lawyer independent of the right of access to the court." The court noted in *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996) that "[p]risoners have no right to a particular prisoner's help in legal matters as long as the putative recipient's constitutional right of access to the courts is not infringed." The Sixth Circuit reasoned similarly in *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999), when it stated that "[i]t is clear in this circuit that an inmate does not have an independent right to help other prisoners with their legal claims." A prisoner's right to assist another prisoner thus "is wholly derivative of that prisoner's right of access to the courts; prison officials may prohibit or limit jailhouse lawyering unless doing so interferes with an inmate's ability to present his grievances to a court." *Id.* at 395. Another circuit made the seemingly obvious point that, "[w]hile it is well established that inmates' access to the courts and counsel may not be abridged, an individual inmate does not have a constitutional right to 'practice' jailhouse law." *Williams v. Nix*, 1 F.3d 712, 716 (8th Cir. 1993) (citations omitted); *see also Johnson v. Rodriguez*, 110 F.3d at 311; *Herron v. Harrison*, 203 F.3d 410, 415-416 (6th Cir. 2000); *Flittie v. Solem*, 827 F.2d 276, 279-280 (8th Cir. 1987); *Smith v. Maschner*,

899 F.2d 940, 950 (10th Cir. 1990); *Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998).

The only other circuit court that even arguably has approached this issue in a manner similar to the court below is the Seventh Circuit Court of Appeals. *See Buise v. Hudkins*, 584 F.2d 223, 229-231 (7th Cir. 1978); *Brookins v. Kolb*, 990 F.2d 308, 312-314 (7th Cir. 1993). The Seventh Circuit, though, refrained from actually determining whether inmates have an independent First Amendment associational right to give legal assistance. In *Buise*, the court withheld a definite ruling when it considered whether an inmate has a First Amendment associational right in "jailhouse lawyering." 584 F.2d at 230. It eventually concluded that an inmate "*may* have First Amendment associational rights in writ writing." *Id.* at 231 (emphasis added.).

The Seventh Circuit continued to analyze associational rights in *Brookins v. Kolb*, 990 F.2d 308 (7th Cir. 1993). *Brookins* dealt with an inmate whom the prison appointed to assist other inmates in what the prison called a Paralegal Base Committee ("PBC"). The prison sanctioned Brookins for failing to follow PBC rules when he wrote a letter to prison administrators about another inmate's misconduct charges. The court found Brookins possessed "associational rights to act on behalf of" the other prisoners "in his capacity as the co-chairman of the PBC. . . . " 990 F.2d at 312. The court acknowledged Brookins possessed only the "limited right" the State gave him and the other inmates "to form and take part in the PBC." *Id.* at 313. The letter he wrote for another inmate, the court said, "represents the extension of his right to associate with [the other inmate] within the scope

of the limited right the State had given the prisoners to form and operate the PBC." *Id.* The court did not directly address whether an inmate had an associational right to assist another inmate with litigation independent of any limited right the prison gave the inmate in the prison paralegal organization.

In two other decisions, *Kunzelman v. Thompson*, 799 F.2d 1172 (7th Cir. 1986), and *Gometz v. Henman*, 807 F.2d 113 (7th Cir. 1986), the court connected the inmate's legal assistance activities only with access to courts. The court in *Gometz*, with somewhat similar facts to the ones presented here, said a prisoner is entitled to adequate access to the courts, not "maximum possible access." *Id.* at 116. The inmate Gometz wanted to assist, like the inmate Respondent purportedly tried to assist here, had an attorney who represented him and the court noted, "legal representation is always sufficient" to satisfy adequate access to courts. *Id.* at 116. The court in *Kunzelman* said the First Amendment right claimed by Respondent and found by the Ninth Circuit may exist, but "the case law is unclear on the point." 799 F.2d at 1178 n.6. The Seventh Circuit, therefore, is at best equivocal on the question Petitioners present here.

If a Fifth, Sixth, Eighth, Tenth, or Eleventh Circuit panel had heard this case, they would have been required by prior circuit authority to reject Respondent's claimed First Amendment right to give legal advice, not only because here Tracy admittedly had no access-to-courts grievance because an attorney represented him, but also because these courts have not found inmates possess a First Amendment right to assist other inmates with legal issues. This Court should grant a writ of certiorari to

resolve the conflict over whether the First Amendment protects an inmate who wishes to assist other inmates with legal claims.

II. THE NINTH CIRCUIT DECISION CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *JONES v. PRISONERS' UNION*, *TURNER v. SAFLEY*, *JOHNSON v. AVERY*, AND *LEWIS v. CASEY*.

A claim that concerns a prison inmate's right to provide legal assistance to another inmate involves a combination of three factors: inmates' rights to associate, to correspond, and to access the courts.[2] While this Court has not addressed these factors together nor in light of the question Petitioners present here, it has provided guidance on each of the three individual factors in a variety of cases. The definitive case involving inmate association is *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), in which the Court held an inmate's right to associate is necessarily curtailed when the government incarcerates him in a correctional facility. The Court resolved the issue of inmate correspondence in *Turner v. Safley*, 482 U.S. 78 (1987). Lastly, it defined a prison's duties and obligations in conjunction with inmate access to courts first in *Johnson v. Avery*, 393 U.S. 483 (1969), and then in *Lewis v. Casey*, 518 U.S. 343 (1996). The Ninth Circuit has expanded significantly the Court's

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[2] The Ninth Circuit did not reach Respondent's access to courts claim (App. 15), and it did not discuss the First Amendment associational right in relation to an inmate's right to access the courts.

holdings in *Jones*, *Turner*, *Johnson*, and *Lewis* without identifying an appropriate doctrinal basis for doing so.

1. Communication between inmates necessarily involves some form of association. The ultimate manifestation of associational rights is, perhaps, best demonstrated through the formation of a union. In *Jones*, this Court reviewed the associational rights of inmates who sought to create a labor union within the North Carolina correctional system. 433 U.S. at 121. The North Carolina Department of Corrections, to curtail the union's recruitment activities, enacted a regulation "prohibit[ing] inmates from soliciting other inmates to join, . . . barred all meetings of the Union, and refused to deliver packets of Union publications that had been mailed in bulk to several inmates for redistribution among other prisoners." *Id.* This Court reversed the district court's injunction against the North Carolina Department of Corrections stating,

> Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate's "status as a prisoner" and the operational realities of a prison dictate restrictions on the associational rights among inmates. Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators.

Id. at 125-126.

Although *Jones* clearly demonstrates that prison officials may curtail an inmate's First Amendment association rights, the Ninth Circuit concluded that inmates have a right to render legal assistance grounded in the First Amendment right to associate. (App. 9). The panel's decision expands inmates' associational rights rather than curtails them.

2. Likewise, if inmates possess a constitutional right to render legal assistance, such assistance may take the form of inmate correspondence as it did in this case. This Court provided guidance concerning inmate correspondence in *Turner*. There, the Court recognized that inmate-to-inmate correspondence poses a number of threats to the security of a prison. Inmates may write "in codes not readily subject to detection. . . . " 482 U.S. at 88. Inmate-to-inmate correspondence enhances the ability of inmates to engage in coordinated disruptive activities, spurs criminal activity, facilitates informal inmate organizations, and may "threaten the core functions of prison administration, maintaining safety and internal security." *Id.* at 88, 91-92; *see also Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989). The Ninth Circuit disregarded or minimized these security concerns, as well as the burden on prison resources. This Court, however, has concluded that "[t]he risk of missing dangerous communications, taken together with the sheer burden on staff resources required to conduct item-by-item censorship, supports the judgment of prison officials that this alternative [monitoring inmate mail] is not an adequate alternative to restricting correspondence." 482 U.S. at 93. The Court

upheld a ban on inmate-to-inmate correspondence with very limited exceptions. *Id.* at 81, 93.[3]

The panel below, in contrast, concluded that legal advice was, "unlikely to cause the harms or injuries" that prison disciplinary rules were intended to prevent. (App. 13). Apparently, it believed that inmate-to-inmate correspondence is unlikely to cause the harms or injuries to prison safety and security this Court recognized in *Turner*. Despite the many inexorable problems this Court identified with inmate-to-inmate correspondence, the Ninth Circuit's decision makes it impossible for a prison to ban inmate-to-inmate correspondence because inmates must have some method by which to exercise their independent constitutional right to render legal assistance. Moreover, despite the fact Respondent sent his legal advice to a maximum security inmate, the Court of Appeals held that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." (App. 12). Prison staff, in short, must forward the purported legal advice to the inmate despite the fact they may not detect and delete everything that constitutes a threat to institutional security, notwithstanding the fact that this Court has determined this is an unacceptable risk to prison safety and security. *Turner*, 482 U.S. at 93.

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[3] The Missouri regulations at issue only permitted correspondence between immediate family members and correspondence concerning legal matters, although, the way Missouri officials implemented the rules it only allowed correspondence between family members.

3. The Ninth Circuit's opinion further conflicts with this Court's prior decisions regarding inmate access to courts. In *Johnson*, this Court rejected a prison regulation that prohibited inmate "writ writers" from advising or helping other inmates with their habeas corpus claims because the prison furnished no other form of legal assistance to inmates. 393 U.S. at 490. The Court concluded that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." *Id.* The Court noted that "techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates." *Id.* The Court identified alternatives such as public defenders, law students, or pro bono bar associations. *Id.* at 489. In addition, this Court stated:

> Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities.

Id. at 490.

Clearly, a State may prohibit writ writers from assisting other inmates so long as it provides other alternatives to inmates who need legal assistance. Here, the state district court appointed an attorney to represent Tracy, and MSP officials sent an inmate law clerk to assist him.

(App. 49). Even after MSP clearly met the *Johnson* mandate and Tracy had two forms of legal assistance, the Ninth Circuit opined that Respondent had a constitutional right to correspond with Tracy and assist him with his pending criminal charges. (App. 6).

Likewise, the Ninth Circuit cannot square its opinion with this Court's ruling in *Lewis*. There, this Court clarified 50 years of rulings on inmate access to courts. It concluded that its previous holdings did "not create an abstract, freestanding right to . . . legal assistance." 518 U.S. at 351. The corollary to that rule is also true: The Court's previous holdings did not create an abstract, freestanding constitutional right to render legal assistance. The Court of Appeals nevertheless held to the contrary. Moreover, under *Lewis*, inmates only possess the right to access the courts to attack "sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id.* at 355. The opinion below gives Respondent the constitutional right to assist Tracy with a criminal prosecution when a member of the Montana bar already represented Tracy.

Clear precedent from this Court governs the fundamental aspects encompassed within Respondent's claims. The ruling in this case contradicts this Court's clear precedent in four seminal cases. The Court should review the Ninth Circuit's ruling and bring the Court of Appeals back into the bounds it previously demarcated concerning how the First Amendment applies in a prison setting.

III. THIS ISSUE IS OF EXCEPTIONAL IMPORTANCE

This Court has long established the "legitimacy, and the necessity, of considering the State's interests in prison safety and security." *Washington v. Harper*, 494 U.S. 210, 223 (1990), citing *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). The issue of whether an inmate possesses an independent First Amendment associational right to render legal assistance to other prison inmates implicates prison discipline, inmate-to-inmate prison correspondence, and the scope of the prison's legal assistance program. This issue, therefore, affects prison security and management.

This Court recognizes the myriad forms of threats inmate-to-inmate correspondence poses to prison security. *Turner v. Safley*, 482 U.S. at 88, 91. Inmates may utilize coded language within written correspondence to coordinate and communicate a wide variety of concerted criminal activity within the facility including "escape plans, assaults, and other violent acts." *Id.* Additionally, inmate law clerk programs may pose additional risks to prison security because they help create a class of inmates who may charge for their services and thereby establish a barter economy within the prison. *See Williams v. Nix*, 1 F.3d 712, 715 (8th Cir. 1993). Also, inmate law clerks may begin to have an "overinflated sense of importance" which leads to disciplinary problems. *Brookins*, 990 F.2d at 315. The issue Petitioners present, therefore, becomes important because prisons within the geographically expansive Ninth Circuit must allow inmates to exercise their First Amendment right to assist other inmates, and prisons must devise methods to eliminate the obvious threats to prison security.

When prison officials must make a determination about a prisoner's right to free speech the officials must balance the right with institutional security and safety concerns. *Turner*, 482 U.S. at 92. The choice prison officials make when they must engage in this balancing act "should not be lightly set aside by the courts." *Turner*, 482 U.S. at 93. This Court consequently has cautioned the lower courts that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U.S. 472, 482 (1995). Even the Ninth Circuit has adopted the view that courts must allow prison officials to manage the prisons without excessive judicial involvement. *See Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995).

The Ninth Circuit's holding that inmates possess a First Amendment associational right to give legal advice to other inmates, regardless of whether the prison provides other types of legal assistance, abrogates prison officials' ability to take appropriate action to ensure the safety of inmates, corrections personnel, and the public. If prison inmates have a constitutional right to give legal assistance to other inmates, prison officials may not infringe that right in the absence of reasonable alternatives for prison inmates to exercise the right. *Turner*, 482 U.S. at 92-93. Accordingly, the prison must provide some method by which inmates may exercise this constitutional right and this will detract from prison officials' ability to make safety and security decisions. The Ninth Circuit's decision also invades the province of state officials, creates attendant security problems, and elevates this to an issue of exceptional importance. Given the disparate analytical approaches courts have taken when they address

this issue, and the extreme importance of the issue to states and their prisons, Petitioners assert that it is appropriate for this Court to grant review and provide much needed clarification and guidance on the scope of prisoners' First Amendment rights and the scope of prisons' inmate legal assistance programs.

CONCLUSION

For the foregoing reasons the Court should grant a writ of certiorari.

Respectfully submitted,

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March, 2000

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN MURPHY, *Plaintiff-Appellant,* v. ROBERT SHAW, Unit Sergeant; LARRY BEARLEY, Hearings Officer; MICHAEL MAHONEY, Bureau Warden; MYRON BEESON, Bureau Warden; and RICHARD S. DAY, Director, Department of Corrections, *Defendants-Appellees.*	No. 97-35989 D.C. No. CV 95-00062-CCL OPINION

Appeal from the United States District Court for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
March 12, 1999 – Seattle, Washington

Filed November 4, 1999

Before: Betty B. Fletcher, Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Jeffrey T. Renz, Montana Defender Project, University of Montana School of Law, Missoula, Montana, for the plaintiff-appellant.

David L. Ohler, Assistant Attorney General, Montana Department of Corrections, Helena, Montana, for the defendants-appellees.

OPINION

B. FLETCHER, Circuit Judge:

Plaintiff-Appellant Kevin Murphy ("Murphy") is an inmate law clerk at the Montana State Prison ("Prison"). In early 1995, he sent a letter containing legal advice to fellow inmate Pat Tracy ("Tracy"). Murphy was subsequently disciplined based on the content of that letter. In this action, Murphy alleges that the discipline imposed by the Prison violated his First Amendment rights, his right as an inmate to access to the courts, and his rights under the Due Process Clause. The district court granted summary judgment in favor of the defendants on all his claims. Because the provision of legal assistance to fellow inmates is an activity protected by the First Amendment, and because the prison regulations challenged here are "an exaggerated response" to otherwise legitimate security concerns, we reverse and remand with instructions that summary judgment be entered in Murphy's favor.

Facts and Procedural History

In early 1995, Murphy, who had been trained as an inmate legal clerk by the Prison, became aware that Tracy,

a fellow inmate, had been charged with assaulting Correctional Officer Glen Galle ("CO Galle"). Murphy had provided legal assistance to Tracy on several prior occasions, and learned that Tracy had requested his assistance in connection with the assault charge. Because Tracy had been transferred to the maximum security wing of the Prison, however, Murphy could not visit him directly. Murphy also knew that counsel had been appointed to represent Tracy. Nevertheless, Murphy began investigating the assault incident, and discovered that other inmates had previously complained about CO Galle's conduct.

On February 16, 1995, Murphy wrote a letter to Tracy which included the following:

> . . . I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another poiont [sic] is that he grabbed you from behind. You tell your lawyer to get ahold of me on this. Don't take a plea bargain unless it's for no more time. . . .

Murphy knew that the letter would be read by prison officials pursuant to prison regulations. The letter was, in fact, intercepted and read by defendant Robert Shaw.[1]

As a result of the February 16 letter, Murphy was "written up." Defendant Shaw completed three Major Misconduct Violation Reports (also known as "Class IIs") charging Murphy with violating the following Prison regulations: Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution). After a hearing, defendant Larry Bearley found Murphy guilty of violating Rules 009[2] and 022.[3] Murphy was given a suspended sentence of 10 days detention and received three "reclassification points."

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[1] Tracy, having never seen the letter, ultimately pleaded guilty to the assault charge. It does not appear that Tracy or his counsel ever were made aware prior to the plea of the information in Murphy's letter.

[2] Rule 009 prohibits the following:

Insolence: Words, actions or other behavior which is intended to harass or cause alarm in an employee.

[Examples:] Cursing; abusive language, writing or gestures directed to an employee.

[3] Rule 022 prohibits the following:

Interference with Due Process Hearings [Examples:] Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff that could result in disciplinary action. (This violation should not be charged for as a retaliation for the writing of a grievance.)

Murphy's appeal was denied by defendant Michael Mahoney.

In October 1995, Murphy filed a complaint against Robert Shaw, Larry Bearley, Michael Mahoney, Myron Beeson, and Richard Day, all employees of the Montana Department of Corrections (collectively, "Defendants"). The complaint, filed as a class action on behalf of all inmate law clerks at the Prison, seeks injunctive and declaratory relief pursuant to 42 U.S.C. § 1983. The complaint alleges that the Prison's imposition of discipline on Murphy (1) violated the First Amendment; (2) abridged the right of inmates to access to the courts and to present habeas petitions; and (3) relied on prison regulations that are void for vagueness on their face and as applied to legal advice rendered by law clerks.

The case was referred for recommendation to a magistrate judge, and Murphy and Defendants subsequently filed cross-motions for summary judgment. Murphy also filed a motion to certify the class. The magistrate judge recommended that Defendants' motion for summary judgment be granted as to Murphy's "right of access to the courts" claims, and that all other motions be denied. Murphy and Defendants each timely filed objections to the magistrate's recommendation. On *de novo* review, the district court concluded that Defendants' motion for summary judgment should be granted in its entirety, and that Murphy's motion for class certification should be

denied.[4] Final judgment was entered by the district court on September 23, 1997. This appeal followed.

ANALYSIS

The district court granted summary judgment in favor of Defendants. A grant of summary judgment is reviewed *de novo*. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). We have jurisdiction pursuant to 28 U.S.C. § 1291 and must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there exist any genuine issues of material fact and whether the district court correctly applied the substantive law. *See id.*

I. Murphy's First Amendment claim

The viability of Murphy's First Amendment claim turns on the application of two established legal principles. First, this court has held that inmates have a First Amendment right to assist other inmates with their legal claims. *See Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985). Second, where a prison regulation, otherwise generally justifiable, implicates a constitutional interest when applied to a protected class of expression, this court applies a balancing test to insure that the regulation is not an "exaggerated response." *See Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995) (quoting *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)). From these two principles flows the

[4] Murphy has not appealed the denial of his motion for class certification.

conclusion that the district court erred in entering summary judgment in favor of Defendants here.

A. Was Murphy acting as a law clerk?

Defendants focus their attention on what they perceive as a threshold issue. In their view, Murphy was not acting as a law clerk when he wrote and sent the February 16 letter to Tracy. Defendants accordingly argue that this case involves merely an unremarkable instance of discipline for inmate-to-inmate correspondence, comfortably within the general rule that prisons may, in the pursuit of the interest of prison security, intercept and confiscate inmate-to-inmate correspondence without running afoul of the First Amendment. *See Turner v. Safley*, 482 U.S. at 89 (inmate-to-inmate correspondence may be banned so long as the policy is rationally related to a legitimate penological interest).

To support their view, Defendants point out that Murphy was not formally assigned by the Prison's law librarian to serve as Tracy's law clerk. Moreover, Murphy was aware that he could not visit Tracy in the maximum security wing, and that counsel had been appointed for Tracy in connection with the assault charge. The district court also noted that Murphy had not been trained to handle criminal cases. Murphy, in response, notes that Tracy specifically asked for his legal assistance. It is undisputed that Murphy had served as Tracy's law clerk on several occasions in the past. Murphy also contends that law clerk assignment procedures were considerably more informal than indicated by the regulations, and that Murphy responded to Tracy's request for assistance in the

usual manner.[5] The contents of the February 16 letter, moreover, plainly relate to Tracy's assault charge, suggesting to Tracy a self-defense theory that he might raise.

On the basis of the undisputed facts, we reject Defendants' threshold argument that Murphy was not acting as a law clerk when he wrote the February 16 letter. Murphy was a trained inmate law clerk responding to a legal inquiry from a fellow inmate, an inmate he had advised on several prior occasions. The letter he sent to Tracy was plainly related to the pending assault charges, and conveyed both factual and legal information that was potentially relevant to Tracy's defense. As will be discussed below, this circuit in *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985), recognized that the provision of legal assistance to a fellow inmate is an activity protected by the First Amendment. The undisputed facts here are enough to raise the First Amendment right recognized in *Rizzo*. *Cf. Rizzo*, 778 F.2d at 531 (plaintiff offered legal advice informally, outside any "inmate law clerk" program sponsored by the prison).

B. Does the Prison's conduct implicate Murphy's First Amendment rights?

The Prison's imposition of discipline on Murphy implicates his First Amendment rights for at least two reasons. First, the letter itself constitutes speech that, outside of the prison context, would doubtless enjoy the

[5] Defendants have introduced no evidence rebutting Murphy's account of the actual operation of the law clerk assignment process.

protection of the First Amendment. The fact that the speech occurs inside the prison walls means that prison authorities may, in appropriate circumstances, regulate the speech, but does not take it outside the reach of the First Amendment altogether. The Supreme Court, for example, has held that censorship of inmate-to-inmate correspondence must be reasonably related to legitimate penological interests in order to pass constitutional muster. *See Turner*, 482 U.S. at 91 (applying "reasonably related to legitimate penological interests" test to challenged regulation of inmate-to-inmate correspondence).

Second, as noted above, the Prison's discipline of Murphy implicates the First Amendment right recognized by this court in *Rizzo*. In that case, we held that the provision of legal assistance to fellow inmates is an activity protected by the First Amendment. *See Rizzo*, 778 F.2d at 531; *see also Pratt v. Rowland*, 65 F.3d 802, 806-07 (9th Cir. 1995) (reaffirming vitality of *Rizzo* after the Supreme Court's decision in *Sandin v. Conner*, 115 S.Ct. 2293 (1995)). *Rizzo* involved a claim by a "jailhouse lawyer" that prison authorities had reassigned him out of a prison vocational program in retaliation for his assisting other inmates with habeas petitions and civil rights actions. *See id.* We held that his legal activities on behalf of other inmates implicated associational rights protected by the First Amendment. *See id.* To the extent such a right exists,[6] the Prison's decision to discipline Murphy in the instant case undoubtedly interferes with that right.

[6] We note that several of our sister circuits have refused to recognize a constitutional right to assist others in pressing legal claims. *See, e.g., Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993) ("[N]o constitutional right to assist exists."); *Smith v. Maschner*,

C. Is the infringement of First Amendment rights justified under the *Turner v. Safley* test?

We next ask whether the Prison's infringement of Murphy's First Amendment rights is justified in light of "legitimate penological interests." *See Turner*, 482 U.S. at 89. Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *see id.* at 84, the courts must accord deference to prison authorities on matters within their expertise, *see id.* at 85. The Supreme Court has designed a special standard of review for the prison context: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89; *accord Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989). While this standard is quite deferential, the Supreme Court has cautioned that "a reasonableness standard is not toothless." *Abbott*, 490 U.S. at 414.

In evaluating the "reasonableness" of a prison's invasion into the constitutional rights of prisoners, the Supreme Court has instructed lower courts to evaluate four factors: (1) whether the governmental objective is legitimate and neutral, and whether the prison regulation is rationally related to that objective; (2) whether there are alternate means of exercising the rights that remain open to prison inmates; (3) what impact accommodation

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899 F.2d 940, 950 (10th Cir. 1990) (an inmate "does not have a protected interest in providing legal representation to other inmates"); *Gassler v. Rayl*, 862 F.2d 706, 708 (8th Cir. 1988) ("[A]n inmate simply does not have the right to provide his fellow inmates with legal assistance.").

of inmates' rights would have on guards, other inmates, and prison resources; and (4) the availability of obvious, easy alternatives to the challenged prison regulation. *See Abbott*, 490 U.S. at 414-18; *accord Mauro v. Arpaio*, ___ F.3d ___, ___ (9th Cir. 1999) (en banc).

1. Rational relation to a legitimate, neutral governmental interest.

The interest advanced by Defendants here is the general interest in security and order. It is undisputed that this interest is legitimate. *See, e.g., Abbott*, 490 U.S. at 415 (prison security is a purpose central to all other corrections goals). It also appears to be "neutral" in the relevant sense – "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." *Id.* Finally, it is also plain that, as a general matter, the Prison Rules at issue – Rule 009 (Insolence) and 022 (Interference with Due Process Hearings) – are rationally related to the Prison's stated interest.

Murphy, however, is not challenging the regulations as applied to inmate correspondence generally. Rather, Murphy attacks the regulations as applied to legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising. When a prison regulation, while rationally-related to a legitimate interest in the general case, threatens constitutional interests as applied to a particular category of protected expression, we must inquire whether the prison rule is "an exaggerated response." *Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995). In answering this question, the court

"must balance the importance of the prisoner's infringed right against the importance of the penological interest served by the rule." *Id.* The court must also "examine the strength of the logical nexus between the penological purpose served and restriction of the prisoner's rights." *Id.*[7]

Here, the enforcement of the prison regulations against Murphy infringes on his First Amendment right to provide legal assistance to fellow inmates. *See Rizzo*, 778 F.2d at 531. At the same time, the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case. The Prison, for example, has little reason to enforce Rule 009 (Insolence) in this context, since it can easily shield corrections officers from any "alarming" statements contained in inmate mail. *See Bradley*, 64 F.3d at 1281 (prison can easily shield COs who have direct

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[7] The court in *Bradley* provided the following illustration:

> A prison rule requiring all inmates to shower on Tuesdays would serve the legitimate penological interest of maintaining hygienic conditions. However, it is unlikely that this Court would permit prison officials to keep a prisoner from attending a court date that happened to fall on a Tuesday. The importance of the prisoner's right to attend his own court date would outweigh the legitimate, though less pressing, prison interest in a clean, fragrant prison atmosphere. Such a rule would be an exaggerated response. Thus, our analysis does not necessarily end at the recognition that the prison rule was adopted to serve, and actually does serve, a legitimate penological interest.

Bradley, 64 F.3d at 1280.

contact with inmates from contents of inmate mail). Similarly, the contents of correspondence regarding cases is unlikely in itself to cause the harms or injuries that Rule 022 is intended to prevent.

Thus, it appears that the "logical nexus" here between the governmental interest and the application of the rules to law clerk correspondence is weak. The *Bradley* balance appears to favor Murphy, suggesting that the prison regulations, as applied to him, are an "exaggerated response."

2. Alternate means of exercising the infringed right.

It does not appear that Murphy has any alternative means to exercise his right to render legal assistance to maximum security inmates who, like Tracy, he is not permitted to visit. Although Defendants suggest that Murphy could have forwarded his letter directly to Tracy's appointed counsel, there is nothing in the record indicating that Murphy had access to that lawyer's name or address.

3. Impact on prison employees, other inmates, and prison resources.

Murphy asks that law clerks not be subject to discipline based on the content of the legal advice they provide. He does not suggest that law clerk correspondence be immune from interception and review. Accordingly, prison officials could continue to monitor correspondence and discipline law clerks for any improper material that

does not relate to legal action. Because Prison officials already review internal inmate mail, evaluating content on a variety of criteria, Murphy's proposed solution would entail no additional burden on prison resources. Similarly, so long as corrections officers who directly interact with inmates are shielded from the mail, there is no risk of their being exposed to "alarming" statements about themselves. *See Bradley*, 64 F.3d at 1281 (prison's security concerns could be easily addressed by "shield[ing] those prison officials who are in direct contact with inmates from reading any insulting remarks that might be contained in . . . grievances."). We conclude that the impact on prison employees and resources would be minimal.

4. Availability of easy, obvious alternatives.

As noted in the preceding section, the purposes of Rule 009 (Insolence) can easily be accommodated by shielding corrections officers who have direct contact with inmates from inmate mail. The fact that the prison officials will read the legal correspondence should be adequate protection against the implementation of any plan to interfere with Due Process Hearings (Rule 022).

D. Conclusion.

In light of the weak nexus between the government's stated penological interest and the category of law clerk correspondence, as well as the availability of ready alternatives, we conclude that the Prison's conduct here constitutes an "exaggerated response." *See Bradley*, 64 F.3d at

1280. Accordingly, we reverse the district court's grant of summary judgment in favor of Defendants with respect to Murphy's First Amendment claim.

In addition, we conclude that summary judgment should be entered in Murphy's favor on his First Amendment claim. The relevant facts are undisputed: Murphy is a law clerk; his letter to Tracy contained legal advice; as applied to legitimate law clerk correspondence, Rules 009 and 022 are an "exaggerated response" to the Prison's interest in security and order, and thus impermissibly infringe Murphy's First Amendment rights. Defendants have failed to identify any issue of material fact that would defeat this legal conclusion.

II. Right of Access to the Courts and Due Process Claims

As noted at the outset, Murphy also argues that the Prison's interference with law clerk mail infringes inmates' right of access to the courts. *See Lewis v. Casey*, 116 S. Ct. 2174 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977). Because we believe he is entitled to summary judgment on his First Amendment claim, we do not reach Murphy's "right of access to the courts" arguments.

We must, however, address at least a portion of Murphy's due process claim. Murphy contends that Rule 009 and Rule 022, both as applied to him and on their face, are so vague as to violate principles of due process. In light of our resolution of Murphy's First Amendment claim, we do not reach his "as applied" challenge to the Prison rules at issue.

As for Murphy's facial challenge to Rule 009 and 022, we begin with the proposition that "[i]t is clearly established, both by common sense and precedent, that due process requires fair notice of what conduct is prohibited before a sanction can be imposed." *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996). Consequently, in order to comply with the dictates of the Due Process Clause, a prison regulation must provide fair notice of what is prohibited before a sanction can be imposed. *See id.*; *accord Rios v. Lane*, 812 F.2d 1032, 1039 (7th Cir. 1987); *Adams v. Gunnell*, 729 F.2d 362, 368-69 (5th Cir. 1984).

Murphy maintains that Rules 009 and 022 do not adequately define the conduct that comes within their scope. This argument fails to persuade – the regulations certainly provide adequate notice to prisoners generally. Rule 009, for example, applies to "words . . . intended to harass or cause alarm in an employee." This definition is supplemented by the following examples: "Cursing; abusive language, writing or gestures directed to an employee." Rule 022, while it lacks a general definition, provides a laundry list of clear examples: "Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff that could result in disciplinary action." While clearer language could be imagined, the challenged regulations are the sort that every prison enforces in order to maintain order. Murphy has not produced any authority to support his facial challenge, and we reject it.

CONCLUSION

The district court's decision is REVERSED and the matter REMANDED with instructions to enter summary judgment in Murphy's favor and for the crafting of an appropriate remedy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY,

Plaintiff,

-v-

ROBERT SHAW, Unit Sergeant, LARRY BEARLEY, Hearings Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RICK DAY, Department of Corrections Director,

Defendants.

CV 95-62-H-CCL

ORDER

(Filed Sep. 10, 1997)

Before the court is the United States Magistrate Judge's Findings and Recommendation regarding Plaintiff's civil rights complaint. The Magistrate Judge recommends that Plaintiff's motion for summary judgment be denied and Defendants' motion for summary judgment be granted as to Plaintiff's claim of denial of access to the courts but denied as to all other claims. Both Plaintiff and Defendants have objected to the Magistrate's findings and recommendations. This court subjects such objections to a *de novo* review. 28 U.S.C. § 636(b)(1).

Plaintiff Kevin Murphy, now paroled from Montana State Prison ("MSP") but apparently facing new felony charges in two counties, was at the time of the filing of

this complaint an inmate law clerk at MSP residing in the high security area. Plaintiff filed his complaint pursuant to § 1983, individually and on behalf of all inmate law clerks, to allege that his First Amendment rights of free speech and right of access to the courts had been violated by MSP authorities.

Plaintiff's complaint arises from MSP's censorship of Plaintiff's inmate-to-inmate correspondence with inmate Pat Tracy, a Maximum Security Unit inmate. Plaintiff wrote to Tracy on February 16, 1995, to offer advice and assistance regarding a pending criminal matter. Tracy had been charged in state district court in Powell County, Montana, with felony assault of an MSP guard. Tracy was already represented by defense counsel, a licensed practitioner, at the time Plaintiff wrote his letter. Because of Plaintiff's housing assignment in the high security area, Plaintiff was not authorized by MSP's written inmate law clerk policy to represent an inmate in the Maximum Security Unit. Nevertheless, Plaintiff sent the following correspondence to Tracy:

> Dear Pat:
>
> How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. the lowside [sic] clerks go up there now. that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass [sic] inmates. He has made homo-sexual

advances toward certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another point is that he grabbed you from behind. You tell your lawyer to get ahold [sic] of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.

Later. . . .

Murph

Pl.'s Mot. For Summ. Judg., Ex. 1.

Following the MSP policy of reading all inmate correspondence entering the Maximum Security Unit, this letter was read by MSP Correctional Officer Robert Shaw, who cited Plaintiff for three major misconduct violations: insolence (Rule 009), interference with due process hearings (Rule 022), and conduct which disrupts or interferes with the security or orderly operation of the institution (Rule 025). Hearings Officer Larry Bearley found Plaintiff guilty of violating Rules 009 and 022, and imposed a sanction of ten days detention, suspended. Bearley

explained that the statement accusing the guard of making homosexual advances to an inmate constitutes an accusation that, if proved true, would result in disciplinary action against the guard. This statement was deemed to fall within Rule 022, interference with due process hearings, i.e., making a false statement of misconduct against another inmate or staff which could result in a disciplinary action. *See* Pl.'s Request for Judicial Notice, Ex. 1, "Inmate Disciplinary Policy," at 6. It is unclear whether Plaintiff's offer to find 100 witnesses was contemplated within this charge. Plaintiff appealed to Defendant Michael Mahoney, who affirmed the Hearings Officer's decision. The statement against the guard was also deemed to constitute insolence (Rule 009), defined by the Inmate Disciplinary Policy as "words, actions or other behavior which is intended to harass or cause alarm in an employee." *Id.* at 4. In affirming the finding of violation and sanction, Mr. Mahoney stated "[t]he letter you wrote to [sic] most definitely causes alarm in this employee." *See* Pl.'s Mot. for Summ. Judg., Ex. 3.

Plaintiff does not argue that Defendants had no right to read his inmate-to-inmate correspondence. *See* Plaintiff's Reply (Docket #50) at 1. Plaintiff does argue that his correspondence was illegally censored and that he was illegally disciplined because of the content of his correspondence, both in violation of his First Amendment rights of free speech and access to courts.

Defendants counter that Plaintiff had no right to give legal advice to another inmate and that, in any event, prison regulations allowing censorship and discipline under these factual circumstances are rationally related to legitimate penological interests.

The Magistrate Judge analyzed Plaintiff's complaint as consisting of a claim for denial of access to the courts asserted on behalf of inmate Tracy and a First Amendment right of free speech. The Magistrate determined that Plaintiff lacked standing to assert a denial of access to the courts claim on behalf of Tracy. Plaintiff objects to this finding of no standing, citing *Johnson v. Avery*, 393 U.S. 483 (1969), in which an inmate was disciplined for assisting other inmates with their legal affairs. This court agrees with Plaintiff that an inmate law clerk does have standing to assert a denial of access to the courts when he can show actual injury, such as disciplinary action. However, *Johnson v. Avery* qualifies the right of an inmate to provide legal assistance with the proviso that the right does not exist if the state provides reasonable alternatives.

As for Plaintiff's First Amendment free speech, the Magistrate grounds the analysis in the *Turner v. Safly*, 482 U.S. 78 (1987), rule that prison administrators may restrict speech if the restrictions are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The Magistrate found that there was insufficient evidence of the relationship between the regulations and the alleged penological interests of MSP. In response, Defendants have submitted the affidavit of Mr. Mahoney, now Warden of MSP, who asserts that MSP Prison Policy 16-001 concerning inmate correspondence is directly related to maintaining order at the institution, security, and inmate rehabilitation. Mr. Mahoney states that no inmate, even an inmate law clerk, can be exempt from the institution's correspondence policies, because "every inmate poses a potential risk to the security and safety of

the institution through correspondence." Def.'s Resp. To Magistrate's Order, Findings, and Recommendation, Aff. of Mike Mahoney at 3.

As for Plaintiff's due process claim that the prison correspondence regulations deprived him of his rights arising under the Due Process Clause of the U.S. Constitution, the Magistrate determined that Defendants had not properly argued the point and summary judgment should be denied on that account. Thus, this court is left with the question whether the Due Process Clause "of its own force" provides protections to Plaintiff that would protect him from the sanctions imposed for his alleged violations. *See Sandin v. Conner*, 115 S. Ct. 2293, 2302 (1993). In *Sandin*, the Court opined that the Due Process Clause might protect inmates of its own force when restraints exceeding their sentences are placed upon them in such an unexpected manner as to trigger this fundamental protection. Defendants respond that this case is not about the use of improper procedures, but about the right of the prison to censor inmate-to-inmate correspondence based upon rationally related and legitimate penological interests.

In reviewing the Magistrate's findings and the objections of the parties, the court has concluded that there has been made a significant mistake of fact. Plaintiff was not acting as an inmate law clerk when he wrote and sent the February 16, 1995, letter to inmate Pat Tracy. First, Plaintiff was not assigned to serve as inmate Tracy's law clerk by the prison librarian, as is required by written policy. *See* Ex. 3 at VI(1), (3), "Inmate Legal Clerk Program," Pl.'s Request for Judicial Notice. Second, Plaintiff was not permitted to work for inmate Tracy because both inmates

resided in the high security side of the prison. Third, Plaintiff was not trained as an inmate law clerk to handle criminal defense cases. Fourth, as Plaintiff clearly knew, inmate Tracy was already represented by defense counsel.

This latter point is significant, because it shows that the State had otherwise provided inmate Tracy with reasonable representation, clearly precluding any denial of access to the courts claim. In fact, Plaintiff's letter could easily be construed as an improper and unethical interference with the attorney-client relationship. In any event, this court finds that Plaintiff was not acting in his role of inmate law clerk when he wrote and sent the February 16, 1995, letter to inmate Pat Tracy, but had clearly exceeded the scope of his appointment by intruding upon a subject matter he was not trained to handle and by imposing himself upon a client he had no permission or authority to contact.

Given this finding, Plaintiff's claims must be analyzed without consideration of any privilege that law clerk status might provide. It is clear that Plaintiff's claim for denial of access to the courts fails. Likewise, Plaintiff's claim for violation of his First Amendment freedom of speech similarly fails in light of the legitimate penological interests asserted by Warden Mahoney. Plaintiff's due process claims under the force of the Due Process Clause do not satisfy the *Sandin* standard that the restraint exceed the inmate's sentence in an unexpected manner.

Plaintiff's First Amendment right to assist other inmates is, in this instance, inconsistent with his status as

a prisoner and with the legitimate penological objectives of MSP. *See Pell v. Procunier,* 417 U.S. 817, 822 (1974). Plaintiff's claim of overbreadth and vagueness of the regulations is based upon a First Amendment right and a Due Process right, both of which are limited by the legitimate penological objectives of the prison. *Ustrak v. Fairman,* 781 F.2d 573, 580 (7th Cir. 1986); *Sandin v. Conner,* 115 S. Ct. 2293 (1995). After applying the four-part test of *Turner v. Safley,* the court finds that there is a valid, rational connection between the prison inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation. The court finds that the alternative proposed by Plaintiff, that communications between Plaintiff and inmate Tracy may be read but otherwise considered privileged, is unacceptable and would have a dangerous impact on guards and other inmates. The prison's concern is reasonable, and ready alternatives are lacking.

In another matter, the court deems the Magistrate's order denying class certification to be a recommendation. The Plaintiff's request for class certification should be denied, however, because, on the facts of this case and for purposes of this litigation, Plaintiff himself does not belong to the class of inmate law clerks. Therefore, Plaintiff cannot satisfy the requirements for certification of a class action under Fed. R. Civ. P. 23.

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's motion for class certification is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment is DENIED, Plaintiff's complaint is DISMISSED, and all relief is denied.

The Clerk is directed forthwith to notify the parties and Magistrate Judge Leif B. Erickson of entry of this order.

Done and dated this 10th day of September, 1997.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

United States District Court

HELENA DIVISION DISTRICT OF MONTANA

KEVIN MURPHY

v.

ROBERT SHAW, Unit Sergeant, LARRY EARLEY, Hearings Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RIck Day, Department of Corrections Director

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV-95-62-H-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. Defendants' motion for summary judgment having been granted and Plaintiff's motion for summary judgment having been denied IT IS ORDERED AND ADJUDGED that Plaintiff take nothing, that the complaint be dismissed, and all relief is denied.

September 23, 1997
Date

Lou Aleksich, Jr.
Clerk

Traci Hargreaves
(By) Deputy Clerk

Honorable Leif B. Erickson
Federal Magistrate Judge
Missoula Division
P O Box 7219
Missoula, MT 59807-7219

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

KEVIN MURPHY, Plaintiff, vs. ROBERT SHAW, Unit Sergeant, LARRY BEARLEY, Hearing Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RICK DAY, Department of Corrections Director, Defendant.	CAUSE NO. CV 95-62-H-CCL ORDER AND FINDINGS AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE (Filed Febr. 26, 1997)

This matter comes before the Court on the parties' cross-motions for summary judgment and Plaintiff's Motion to Certify Class. The Court, having reviewed the briefs and being fully advised, now hereby enters the following Findings and Recommendation under 28 U.S.C. § 636(b)(1)(B):

RECOMMENDATION

1. Plaintiff's cross-motion for summary judgment should be **DENIED.**

2. Defendants' cross-motion for summary judgment should be **GRANTED** as to Plaintiff's claim of denial of access to the courts. Defendants' cross-motion for summary judgment should be **DENIED** in all other particulars.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of the United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to these findings must be filed with the Clerk of Court and copies served on opposing counsel within ten (10) days after receipt hereof, or objection is waived.

IT IS FURTHER ORDERED that Plaintiff's Motion to Certify Class is **DENIED.**

DATED this 26th day of February, 1997.

/s/ Leif B. Erickson
United States
Magistrate Judge

RATIONALE

I. BACKGROUND

The subject matter of this action revolves around Plaintiff's attempted written communication with another Montana State Prison inmate, Pat Tracy. In early 1995 Tracy was accused of assaulting correctional officer Galle. Following the assault Tracy was moved to the maximum

security section of Montana State Prison. The assault gave rise to felony criminal charges against Tracy in Powell County, Montana, to which Tracy ultimately pled guilty.

At the time of the assault Plaintiff was an inmate law clerk in the Maximum Security Unit of Montana State Prison. He had previously assisted Tracy in unrelated legal matters. Apparently Tracy requested assistance from Plaintiff, but the law librarian advised him that high security inmates were no longer allowed to visit the Maximum Security Unit. A low security inmate law clerk made arrangements to see Tracy, however Tracy refused to speak to him because the law clerk allegedly had developed a reputation for disclosing information to others.

On February 16, 1995, Plaintiff wrote a letter to Tracy which reads as follows:

> How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore, the lowside clerks go up there now, that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we

> must pursue this out of the prison system. I am filing suit with everyone in Close I and II named against him. So you can use that too!
>
> Another point is that he grabbed you from ~~behind. You tell~~ your lawyer to get ahold of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .

Defendant Robert Shaw, a correctional officer, intercepted this letter, read it, and gave Plaintiff three disciplinary violation reports for writing and sending the letter. Shaw claimed plaintiff violated Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct Which Interferes or disrupts the Security or Orderly operation of the Institution). Defendant Larry Bearley found Plaintiff guilty of violating Rules 009 and 022, and sanctioned him to ten days detention, all suspended. Defendant Mahoney denied Plaintiff's appeal of the disciplinary violations.

In his Complaint, Plaintiff claims that: (1) Defendants' actions in disciplining law clerks based upon the content of their communications violates the First Amendment to the United States Constitution, (2) Defendants' actions abridge the rights of inmates to access the courts by denying them the assistance of an inmate law

clerk, (3) Defendants' actions abridge the rights of inmates to seek a writ of habeas corpus pursuant to 28 U.S.C. § 2254, (4) Defendants' enforcement of disciplinary Rule 009 deprived Plaintiff of his right to due process and his right to free speech, and (5) Defendants' enforcement of disciplinary Rule 022 deprived Plaintiff of his right to due process and free speech.

For his relief Plaintiff seeks an order from this Court which declares (1) disciplinary Rules 009 and 022 unconstitutionally vague and overbroad and in violation of the First and Fourteenth Amendments, and (2) the Defendants' practice of disciplining law clerks based on the content of their advice to other inmates violates the First Amendment. Plaintiff also seeks an injunction which prohibits the Defendants from (10 enforcing Rule 009, (2) enforcing Rule 022, and (3) disciplining inmate law clerks for communications with inmate clients.

II. APPLICABLE LAW

A. Summary Judgment

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). On a motion for summary judgment, this Court must determine whether a fair-minded jury could return a verdict for the nonmoving party. *Id.* at 252.

The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 217, 323 (1986).

Where the moving party has met his initial burden with a properly supported motion, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, at 248. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. *Id.* Where the moving party has not met his initial burden the motion should be denied regardless of the nonmoving party's response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

In evaluating the appropriateness of summary judgment the Court must first determine whether a fact is material; and if so, it must then determine whether there is a genuine issue for the trier of fact, as determined by the documents submitted to the Court.

As to materiality, the applicable substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes which are irrelevant or unnecessary to the outcome are not considered. *Anderson*, at 248.

B. Prison Regulations

"Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). For example, prisoners retain protections afforded by the First Amendment. *Johnson v. Avery*, 393 U.S. 483 (1969). Regulations impinging on such rights shall be analyzed under the reasonableness standard of *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64 (1987).

In *Turner* the Supreme Court held that when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89, 96 L. Ed. 2d at 79. In accordance with *Turner*, the courts must consider several factors in determining the reasonableness of a prison regulation. First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. *Turner*, 96 L. Ed. 2d at 79, (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984). Second, the court must consider whether there are alternative means of exercising the rights that remain open to prison inmates, keeping in mind the judicial deference owed to correction officials. *Id.* The third consideration "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* 96 L. Ed. 2d at 79-80. "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* at 80. The regulations must not be an "exaggerated response" to concerns in prison. *Id.*

III. DISCUSSION

A. Access to the Courts

It is clear that convicted prisoners have a fundamental right of meaningful access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977). The right is necessary for inmates to "attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 135 L. Ed. 2d 606, 620 (1996). However, "[b]ecause *Bounds* did not create an abstract, free-standing right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense." *Lewis v. Casey*, 135 L. Ed. 2d at 618. "Insofar as the right vindicated by *Bounds* is concerned, 'meaningful access to the courts is the touchstone,' *Bounds*, 430 U.S. at 823, 97 S. Ct. at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 135 L. Ed. 2d at 618.

While *Lewis v. Casey* deals with claimed inadequacies in a law library and legal assistance program, it nonetheless requires inmates to demonstrate relevant actual injury. In this case Murphy has not shown any actual injury to himself, or that Defendants have hindered his efforts to pursue a legal claim. Significantly, Plaintiff does not even allege that he has a claim to pursue. Instead, his claim is based upon the theory that the fear of discipline impermissibly burdens his right of meaningful access to the courts by its chilling effect on the content of his

written communications with other inmates. For the same reason that an inmate cannot establish relevant actual injury simply by establishing that a library or legal assistance program is sub-par in some theoretical sense, this Court will not permit Plaintiff to establish relevant actual injury simply by claiming that the challenged prison regulations have, in some theoretical sense, a chilling effect on the content of written prisoner communications. Therefore, absent an actual injury Plaintiff lacks standing to pursue a claim of a denial of his right of access to the courts.

Although Plaintiff cannot show any actual injury to his right of access to the courts, he also argues that he can pursue a claim for a denial of access to the courts on behalf of Tracy. However, the cases Plaintiff relies on in support of this theory either involve an inmate who was acting only on his own behalf, or require that the court find that the plaintiff's assistance was the only resource available to the other inmates. *See Gibbs v. Hopkins*, 10 F.3d 373, 378-79 (6th Cir. 1993) (only resource available); *Vaughn v. Trotter*, 516 F. Supp. 886, 891-92 (M.D. Tenn. 1980) (must show absence of alternatives for other inmate); *Johnson v. Avery*, 393 U.S. 483, 490 (1969). The Court is not aware of any controlling or persuasive legal authority for asserting a right of access to the courts on behalf of a third party absent the showing of other required circumstances. The Court acknowledges that the Ninth Circuit has employed broad language with regard to an inmate's right of access to the courts on "behalf" of other inmates. *Navarette v. Enomoto*, 536 F.2d 277, 280 (9th Cir. 1976), *rev'd on other grounds Procunier v. Navarette* 434 U.S. 555 (1978). However, although the plaintiff in

Navarette was a law librarian, the facts of the case indicate that the plaintiff was acting only on his own behalf.

By his communication to Tracy, Plaintiff was not attempting to pursue any legal claims or defenses on his own behalf. Rather, he was allegedly attempting to assist Tracy in formulating a defense to criminal charges filed against Tracy. Accordingly, the Court finds that Plaintiff lacks standing to assert Tracy's access to the courts claim. *See, e.g. Tuggle v. Barksdale*, 641 F. Supp. 34, 36 (W.D. Tenn. 1985) ("one inmate does not have the standing to assert the separate constitutional right of another inmate to [his] access to the courts[.]"); *Gassler v. Rayl*, 862 F.2d 706, 707-708 (8th Cir. 1988); *Schenck v. Edwards*, 921 F.Supp. 679, 682-683 (E.D. Wash. 1996).

B. First Amendment

In addition to Plaintiff's claim of denial of access to the courts, he asserts that Defendants have interfered with his First Amendment right to assist other inmates. Although a prisoner does not have the full constitutional rights of a person who is not incarcerated, it is clear that a

> prison inmate retains those First amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.

Pell v. Procunier, 417 U.S. 817, 822 (1974). Accordingly, prison administrators may impose restrictions on the freedom of speech, but the restrictions must be "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

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The Ninth Circuit Court of Appeals has held that "prison officials may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance." *Bradley v. Hall*, 64 F.3d 1276, 1282 (9th Cir. 1995).[1] The court went through the four-part analysis set forth above as required by *Turner v. Safley*, 482 U.S. 78 (1987) to determine if the prison regulations at issue in *Bradley* unconstitutionally infringed upon the inmate's right to petition the government for redress of grievances. The court determined that punishing an inmate for the content of his written grievance was an exaggerated response to prison concerns. *Bradley*, 64 F.3d at 1281. The court left open the possibility that there may be situations in which prison officials may properly discipline inmates for criminal threats contained in written grievances. *Id.*

Without the aid of affidavits of prison personnel or any other supporting material Defendants argue, in conclusory fashion, that the confiscation of the offending letter and disciplinary action against Plaintiff are both rationally related to a legitimate penological interest. Moreover, the communication at issue is between inmates

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[1] In *Bradley* the court analyzed the facts primarily under the right of access to the courts and the First Amendment right to petition the government to redress grievances. *Bradley* 64 F.3d at 1280. However, freedom of speech issues were also implicated, *Id.* at 1281, and the analysis of *Turner* is the same. *See Rios v. Lane*, 812 F.2d 1032 (7th Cir. 1987). Although in this case Plaintiff's right to petition the government for redress of grievances is not implicated, his First Amendment rights of freedom of expression and association are implicated by Defendants' actions.

in the highest security section of Montana State Prison where the need for strict control is utmost.

Plaintiff, of course, argues to the contrary that Defendants have failed to show that the conduct at issue is rationally related to a legitimate penological objective. Plaintiff is an inmate law clerk and the subject of his letter concerns advice to another inmate regarding a defense to felony assault charges. The Court is faced with the question of determining whether the mere fact that the letter purportedly involves advice to another inmate regarding a defense to felony charges entitles the communication to greater protection. *See Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985) (recognizing First Amendment right to assist another inmate in vindicating civil rights).

While the district court in *Bradley* resolved the matter on summary judgment it also had the benefit of affidavits of prison personnel, correctional institution experts, and inmates. Defendants have not presented any affidavits on the issue of the relationship between the regulations and the alleged penological interests of the Montana State Prison. Consequently, the Court finds that Defendants have not met their burden of establishing the absence of a genuine issue of material fact, and the Court is unable to determine if the challenged regulations permissibly infringe upon Plaintiff's First Amendment rights under the *Turner* standard set forth above. Therefore, their motion should be denied. *See Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994), supra.

Similarly, Plaintiff has not met his initial burden in his motion to show the absence of a genuine issue. Therefore, he is not entitled to summary judgment.

C. Overbreadth and Vagueness

Plaintiff contends the regulations at issue are both vague and overbroad. In his Complaint, Plaintiff presents his legal cause of action on the basis that the regulations violate both his First Amendment rights and his due process rights. Compl. at 4-5. However, in his prayer for relief Plaintiff seeks a declaratory judgment only on the basis of his First Amendment rights. Compl. at 5. Similarly, Plaintiff's arguments on this issue in his briefs on the pending motions are based only on the First Amendment theory. He states that he "has not claimed the loss of a liberty interest nor a denial of due process as his basis for standing . . . [, but instead he] alleges abridgment of First amendment rights to free speech and access to the courts." Plaintiff's Reply at 5. Defendants, on the other hand, argue for summary judgment in their favor based on both the First Amendment and due process theories.

The Court acknowledges that the vagueness and overbreadth arguments can fall under either the First Amendment, or the due process clause, and the legal theories are independent of each other. *See Rios v. Lane*, 812 F.2d 1032, 1039 (7th Cir. 1987) (completely distinguishable and independent theories). Accordingly, the Court will address the theories separately.

1. Due Process

As a threshold issue, Defendants argue that in light of the "atypical and significant hardship" analysis under *Sandin v. Conner*, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), Plaintiff has no standing to complain about the sanction imposed against him for violation of the subject regulations, and therefore he has no due process interest to assert. However, the principles expressed in *Sandin* on which Defendants rely are not controlling in the facts of this case. The specific question addressed by *Sandin* was under what circumstances do "state prison regulations afford inmates a liberty interest protected by the Due Process Clause." *Sandin*, 115 S. Ct. at 2295. In addition to the "atypical and significant hardship" analysis, the Court also addressed the question of whether the facts of the case invoked protections provided by the Due Process Clause "of its own force[.]" *Sandin*, at 2300, 2302. Therefore, even under the authority of *Sandin*, the court must additionally consider whether the Due Process Clause, "of its own force," provides protections to the inmate. *See Higgason v. Farley*, 83 F.3d 807, 809 (7th Cir. 1996). *See also El-Amin v. Tirey*, 817 F. Supp. 694 (W.D. Tenn. 1993) (analyzing prison regulations under the Due Process Clause); *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992) (analyzing prison regulations under the Due Process Clause).

In this case, Plaintiff does not argue that he has a liberty interest arising from the regulations in question. Rather, Plaintiff argues that the regulations deprived him of his rights which arise from the U.S. Constitution. Accordingly, the Court construes Plaintiff's claims as

being presented on the basis that he has certain protections of his constitutional rights provided by the Due Process Clause of its own force.

Because Defendants argue that they are entitled to summary judgment based only on the "atypical and significant bardship" analysis of *Sandin*, they have not presented any legal argument in support of summary judgment based on the Due Process Clause of its own force. Accordingly, Defendants have not met their initial burden and are not entitled to summary judgment on their due process theory.

2. First Amendment

Plaintiff contends that the subject regulations are both vague and overbroad in violation of the First Amendment. Although these legal theories require a particular analysis, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

> the concepts of "overbreadth" and "vagueness" in the jurisprudence of the First Amendment were devised in order to prevent the slightest discouragement of free speech, and therefore have only limited relevance to a sphere where the right of free speech is limited.

Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986) (applying concepts in challenge to prison regulation). Ultimately, the Court must still find that the subject regulations violate Plaintiff's First Amendment rights after analyzing the four-part test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See Rios v. Lane*, 812 F.2d 1032,

1035-36 (7th Cir. 1987) (inmate retains only those First Amendment rights that are not inconsistent with legitimate penological objectives).

However, in addressing the analysis under *Turner* set forth above, Plaintiff has not met his initial burden of showing the absence of any genuine issue of material fact. Accordingly, the Plaintiff's motion should be denied. *See Little v. Liquid Air Corp.*, supra.

Similarly, as indicated above, Defendants have not met their initial burden of establishing that the regulations are reasonably related to legitimate penological interests under *Turner*. Accordingly, Defendants are not entitled to summary judgment.

D. Certification as a Class Action

Plaintiff seeks certification of this action as a class action under Fed. R. Civ. P. 23. Plaintiff argues that the proposed class consists of "all current and future inmates who may rely on inmate law clerks or 'jailhouse lawyers' and all current and future inmates who are inmate law clerks or 'jailhouse lawyers'." Plaintiff's Motion to Certify Class at 1.

The Court finds that Plaintiff's motion suffers from two defects. First, Plaintiff is not currently a member of the class of inmates who may rely on other inmate law clerks because none of his present claims are based on his reliance on another inmate law clerk. Article III of the U.S. Constitution, which requires an actual "case or controversy," also requires that when a suit takes the form of a class action, the named plaintiff must share the same

injury. *DePree v. United States*, 559 F.2d 1151, 1153 (9th Cir. 1977). "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified[.]" *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S. Ct. 553, 559, 42 L. Ed. 2d 532 (1975)). Plaintiff is not presently a member of this class of inmates.

Second, Plaintiff has not established that the class of current and future inmates who are inmate law clerks or "jailhouse lawyers" is so numerous that joinder of all members is impracticable as required by Fed. R. Civ. P. 23(a)(1). Defendants indicate that there are presently only about 6 inmate law clerks at the Montana State Prison. Defendants' Response at 3.

Accordingly, Plaintiff has not satisfied the requirements for the class certification of this action and his motion is denied.

cc: Jeffrey T. Renz
Attys. for Dept. of Corrections

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN MURPHY, Plaintiff-Appellant, v. ROBERT SHAW, LARRY BEARLEY, MICHAEL MAHONEY, MYRON BEESON, and RICHARD S. DAY, Defendants-Appellees.	)	No. 97-35989 D.C. No. CV-95-00062-CCL ORDER (Filed Jan. 7, 2000)

Before: B. FLETCHER, REINHARDT and THOMAS, Circuit Judges

The panel has voted to deny appellees' petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

February 16, 1995

Dear Pat:

How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. The lowside clerks go up there now. that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass [sic] inmates. He has made homosexual advances toward certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another poiont [sic] is that he grabbed you from behind. You tell your lawyer to get ahold [sic] of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.

Later. . . .

Murph

From Inmate Kevin Murphy
Legal Clerk

To: Pat Tracy
Max
Insti. Mail

JEFFREY T. RENZ
SHARON M. NOEL, Legal Intern
Montana Defender Project
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

KEVIN MURPHY, individually an on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	No. CV 95-62-H-CCL AFFIDAVIT OF PAT TRACY

STATE OF MONTANA)
:ss
County of Powell)

Before the undersigned, a notary public for the State of Montana, personally appeared Pat Tracy, who, having been duly sworn, on his oath deposes and says that this affidavit is made on his personal knowledge, and that if he were to appear as a witness in the above-captioned matter, he would competently testify as follows:

1. I am an inmate confined at Montana State Prison, Deer Lodge, Montana.

2. I am from Butte, Montana.

3. I am housed on the high security side of Montana State Prison and was housed there in late 1994, early 1995.

4. On August 11, 1994, I was charged by information with felony assault.

5. On August 11, 1994, I asked for my own attorney.

6. On August 25, 1994, I was appointed counsel.

7. I requested the legal assistance of Kevin Murphy, an inmate law clerk through Dave Beatty, prison librarian, through prison kites, and by passing the word to Murphy.

8. I wanted Kevin Murphy's assistance with those charges pending against me and with framing the issues.

9. Kevin Murphy has provided me with legal assistance many times dating back to the mid-1980's including an appeal to the 9th circuit.

10. I was told that I could only see the low side law clerks. A low side law clerk came to speak with me. I refused to talk to him because this law clerk had a reputation for disclosing information obtained from meeting with inmates.

11. I never received the February 16, 1995 letter sent by Kevin Murphy to me and did not get a copy of it until June 1996.

12. To avoid the risk of a persistent felony offender enhancement by the County Attorney, I pled guilty to felony assault.

FURTHER AFFIANT SAYTH NOT.

DATED this 12th day of July, 1996.

/s/ Pat Tracy
Pat Tracy

SL 1 PAGE 1

No. 99-1613

Supreme Court, U.S.
FILED
JUN 26 2000
CLERK

RECEIVED
JUN 19 2000
UNIVERSITY of MONTANA
SCHOOL of LAW

In The
SUPREME COURT OF THE UNITED STATES

ROBERT SHAW, LARRY BEARLEY,
MICHAEL MAHONEY, MYRON BEESON,
AND RICHARD S. DAY,

Petitioners,

-v-

KEVIN MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Kevin Murphy, being first duly sworn according to the law, depose and say that I am the Respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

Answer: No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Answer:

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer: August 1994 - $100.00 per week.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest dividends, or other source?

Answer: No.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Answer:

3. Do you own any cash or checking or savings account?

Answer: No.

a. If the answer is yes, state the total value of the items owned.

Answer:

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

a. If the answer is yes, describe the property and state its approximate value.

Answer:

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Kevin Murphy

Subscribed and Sworn to Before
me this 15th day of June, 2000.

Carol J McCracken
Notary Public State of Montana
Residing at Shelby, Montana
My Commission Expires: 02/01/04

Carol J. McCracken
NOTARY PUBLIC for the State of Montana
Residing at Shelby, Montana
My Commission Expires February 1, 2004

ACCTSTMT

CCA CROSSROADS CORRECTIONAL CENTER
Inmate Account Statement #53
For Account 1 - From: 01/01/2000 To: 06/21/2000

06/21/2000

Murphy, Kevin

Facility ID: 12810

Location: A217L

Type	Trans. Date	Deposit Source	Trans. Nbr	Beg. Balance	Trans. Total	Ending Balance
D	01/11/2000	WAGES	50867	0.27	2.50	2.77
D	01/18/2000	MAIL	51288	2.77	10.00	12.77
P	01/20/2000		51465	12.77	12.76	0.01
D	02/08/2000	CORRECTION	52341	0.01	200.00	200.01
D	02/09/2000	WAGES	52556	200.01	7.50	207.51
P	02/11/2000		52757	207.51	94.00	113.51
M	02/11/2000		52830	113.51	100.00	13.51
P	02/16/2000		53013	13.51	8.01	5.50
P	02/18/2000		53224	5.50	-1.51	7.01
M	02/19/2000		53263	7.01	6.00	1.01
D	03/10/2000	WAGES	54435	1.01	12.50	13.51
P	03/14/2000		54703	13.51	13.39	0.12
D	04/10/2000	MAIL	56369	0.12	30.00	30.12
P	04/12/2000		56534	30.12	21.45	8.67
P	04/26/2000		57366	8.67	8.48	0.19

Beginning Balance For Date Range :	0.27
Total Net Transactions For Date Range :	-0.08
Calculated Ending Balance For Date Range :	0.19
Total Records Printed :	15

RECEIVED
JUN 26 2000
UNIVERSITY of M... ...
SCHOOL of LA...

I certify this true + correct
Business Manager L. Lann
June 22, 2000

Supreme Court, U.S.
FILED
JUN - 6 2000
CLERK

No. 99-1613

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

ROBERT SHAW, LARRY BEARLEY,
MICHAEL MAHONEY, MYRON BEESON,
AND RICHARD S. DAY,

Petitioners,

-V-

KEVIN MURPHY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY T. RENZ
Criminal Defense Clinic
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823

Counsel of Record

QUESTION PRESENTED

May state prison officials, consistent with the First Amendment, punish an inmate after he writes a letter to another inmate, who has been charged with assaulting a corrections officer, where (a) the letter offered factual information and other general advice relating to the defense of such charge, (b) the prison has no rule that forbids prisoners from writing letters to one another, and (c) the punishment is based solely on the objections that those officials have to the contents of the letter?

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STATEMENT OF THE CASE

In early 1995 Montana State Prison inmate Pat Tracy was charged in Montana district court with assaulting correctional officer Glen Galle. In accordance with prison policy, Tracy was moved into a segregation block located in the Prison's Maximum Security unit. At the time Respondent Kevin Murphy was housed on the "high security" side of Montana State Prison where Tracy had been housed.

Although Tracy had a court-appointed attorney, he asked for Murphy's help on his case. Murphy had been designated as a law clerk by the Prison and had provided Tracy with legal help on many occasions in the past. The Prison's Librarian advised Tracy that high security inmates, like Murphy, were no longer allowed to visit the Maximum Security unit. A legal clerk from the low security area of the prison made arrangements to see Tracy. That law clerk, however, had a reputation for breaching confidence and Tracy understandably refused to speak with him.

Tracy's requests and the allegations against Tracy came to Murphy's attention. Murphy looked into reports that Officer Galle had made sexual advances toward inmates. His investigation began to bear fruit as Murphy learned that a number of inmates had circulated a petition complaining of Galle's wrongful conduct in other matters.

Thus, on February 16, 1995, Murphy wrote a letter to Tracy. In this letter Murphy told Tracy that he could no longer go the Maximum Security unit but,

> I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation.

> . . .
>
> Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time.
>
> . . .
>
> I will write again when I get this thing against Galle finished.

App. 46

On February 17, 1995, corrections officer and defendant Robert Shaw intercepted this letter, read it, and charged Murphy with three major misconduct violations. Shaw alleged that Murphy violated Montana State Prison Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution). The Insolence charge alleged:

> . . . In this letter, Inmate Murphy accused CO Galle of being an overzealous guard who punishes and harasses inmates for personal pleasure. Inmate Murphy also accused CO Galle of making homosexual advances towards inmates. Inmate Murphy stated that CO Galle retaliated against Murphy by writing him up on two [word unreadable] infractions.

The charge of "Interference with Due Process Hearings" alleged:

> . . . In this letter Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to "do something" about CO Galle, but he (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact.

The Prison hearing officer acquitted Murphy of the charge of "Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution." He found Murphy guilty of violating Rule 009 (Insolence) and Rule 022 (Interference with Due Process Hearings.) Bearley sentenced Murphy to ten days detention and suspended the sentence. Warden Mahoney denied

Murphy's appeal.

Murphy sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. After Murphy and the Petitioners moved for summary judgment, the District Court granted summary judgment in the Petitioners' favor and dismissed the complaint. Murphy filed a timely appeal. The Court of Appeals reversed.

At this point several facts (omitted from the Petition) should be noted. No Prison policy governing association rights was at issue. Montana State Prison did not "write up" or punish Murphy for writing to Tracy. The Prison did not "write up" or punish Murphy for attempting to contact Tracy in the Maximum Security Unit of Montana State Prison. The Prison did not "write up" or punish Murphy for some such thing as acting outside the scope of his inmate legal clerk duties. Murphy was not punished for "jailhouse lawyering."

The Prison also did not prohibit inmate-to-inmate correspondence. Resp. App. 5, ¶¶ 3,4. The Prison limited its regulation of inmate-to-inmate correspondence to inspection of inmate mail and confiscation of mail that violated its mail policy. Murphy did not challenge that regulation. The Prison cited Murphy and punished him solely because of the content of his letter.

Tracy eventually pled guilty to felony assault without the benefit of the information in Murphy's letter. App. 49. These facts were undisputed in the record before the courts below.

REASONS FOR DENYING THE WRIT

I. BECAUSE MONTANA STATE PRISON DID NOT FORBID OR REGULATE INMATE-TO-INMATE CORRESPONDENCE, THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THOSE OF OTHER CIRCUITS

A. This Case Is About Regulation of Content of Communication, Not About Regulation of Inmate Law Clerks.

The Petitioner contends that the Circuit Court of Appeals' decision in this case conflicts with the holdings of *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993); *Gassler v. Rayl*, 862 F.2d 706, 708 (8th Cir. 1988); *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990); *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996); and *Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998). We now examine that contention.

There is a great distinction between "writ-writing" and Murphy's letter. A jailhouse lawyer advises, assists, or aids another inmate in the preparation of writs or other legal matters. *Johnson v. Avery*, 393 U.S. 483, 484, 489 (1969). Montana State Prison's policies likewise describe an inmate law clerk's functions. The functions include (1) "counsel with complaining inmates," (2) "define issues in matters to be addressed through legal channels," (3) instruct inmates in document preparation and legal research, instruct inmates on procedures in civil rights and post-conviction matters "and other forms of asserting claims."

Murphy's letter does not fit well under these functions. Rather, his letter is akin to that from a witness in a legal proceeding. ("Tell your lawyer to get a hold of me on this (and this is why)," Murphy wrote.) This is witness language, not lawyer language. This letter was Murphy's only communication with Tracy and is adequately addressed by this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987).

Montana State Prison may be able to regulate such communications– inmate-to-inmate correspondence–provided its regulation satisfies *Turner*. But it cannot do so under the guise of regulating writ-writing. In any event, the Prison promulgated no regulation that prohibited Murphy's communication.

Notwithstanding the Petitioners' attempt to recast this as a case involving the rights of inmates who are legal clerks, whether Murphy was or was not an inmate law clerk is immaterial. Murphy was punished for the content of his letter, not because he "exceeded" any right that a law clerk has in prison.

A convicted felon "retains a variety of important rights that the courts must be alert to protect." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). These rights include "those first amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). "Outside prison walls, the Supreme Court has recognized that 'the right to cooperate in helping and advising one another in asserting their rights' is protected by the First Amendment in a variety of contexts." *Buise v. Hudkins*, 584 F.2d 223, 230 (7th Cir. 1978) (citation omitted); *see Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964) (holding that union members and officials could not be prohibited from advising members to obtain legal advice about their injuries or from recommending specific attorneys); *NAACP v. Button*, 371 U.S. 415 (1963) (holding that NAACP lawyers and staff could not be prohibited from advising people that their rights had been violated or from referring them to certain attorneys); *cf.*, *Cornell v. Woods*, 69 F.3d 1383, 1388 (8th Cir. 1995) (holding that right to freely participate in government investigations is not inconsistent with one's status as a prisoner).

Prisons, however, retain the power to limit, regulate, or proscribe inmates' first amendment rights, so long as the prison's regulation is rationally related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). The Court of Appeals' decision in this case adheres to *Turner* and *Abbott* and does not conflict with other Circuits' decisions, which are limited to prisons' power to regulate jailhouse lawyers.

The Court of Appeals' decisions relied upon by the Petitioner address a different kind of right: the claimed "right" to hold a position as an inmate law clerk. In *Gassler* the inmate claimed that his transfer and loss of his law clerk position was retaliatory and violated his "right" to assist other inmates with legal claims. The Eighth Circuit accurately analyzed the claim as a claim of a right to hold a particular position or perform a particular function and concluded that the inmate had "no right to be . . . a jailhouse lawyer independent of the right of access to the court." *Gassler*, 862 F.2d at 707-708. If an inmate chose to assert a retaliation claim, it would have to be versed in access to the courts terms and assert that the prison's retaliation denied other inmates access to the courts. Put differently, the Eighth Circuit's opinion addressed a case in which the inmate claimed a right to be a jailhouse lawyer, not a case in which the inmate, whether a jailhouse lawyer or not, was punished for the content of his communication. Here the right at issue is the right to write letters to other inmates. That right is shared by inmates regardless of their status.

Similarly, in *Smith* the inmate complained that he had been punished because of his "jailhouse lawyering" on behalf of himself and others. *Smith*, 899 F.2d at 892. The inmate claimed retaliation for his activity, not for the content of any letter. Notably, *Smith* is somewhat

consistent with the decision in the case at bar. The Tenth Circuit concluded that the inmate's own litigation was a "form of political expression and political association much as the Supreme Court has held litigation to be for certain organizations outside the prison setting . . . . The right of free expression is cherished for its force as an agent of social change and not only as a right of self-interested individuals." *Id.* at 950. It was on this First Amendment ground that the Court of Appeals allowed the inmate to pursue his claim. *Id.*

Gibbs relied upon *Gassler* and *Smith*. Like the inmates in those cases, the inmate in *Gibbs* claimed that he suffered retaliation for "jailhouse lawyering." *Gibbs*, 10 F.3d at 375-76. The Sixth Circuit noted, "there is technically no independent right to assist" so long as inmates have other means of accessing the courts. *Id.* at 378. As with *Gassler*, the Sixth Circuit's focus was on the "right" to function as a legal clerk, rather than upon the right to be free from punishment for the content of any communication.

Tighe continued the *Gassler* line of decisions and, like those decisions, addressed a claim of retaliation. The inmate claimed a First Amendment right to provide legal assistance to other inmates. *Tighe*, 100 F.3d at 43. The Fifth Circuit, as had its predecessors, held that there was "no right to be . . . a jailhouse lawyer independent of the right of access to the court." *Id.* Similarly, in *Bass*, inmates challenged a prison regulation that forbade inmate-to-inmate circulation of legal materials. *Bass*, 143 F. 3d at 1443. The Eleventh Circuit engaged in a *Turner* analysis of the regulation. It noted, in dictum, that other circuits had not recognized an independent First Amendment right to provide legal assistance. *Id.*, 143 F.3d at 1446.

This line of cases describes a set of principles. First, prisons are free to regulate inmates who act as inmate law clerks, consistent with *Turner* and with *Lewis v. Casey*, 518 U.S. 343

(1996). Second, inmates who are accorded the opportunity to work as law clerks have no personal, independent right to continue in that position. Neither principle was at stake in the case at bar.

Murphy was not punished for assisting or attempting to assist Tracy. There was and still is no Montana State Prison rule that forbids Murphy or any other inmate from corresponding or speaking to another inmate about legal proceedings. Perhaps Montana State Prison could have regulated or prohibited such communications, *but cf.*, *Turner*, 482 U.S. at 81 (stating that prison regulated inmate-to-inmate correspondence, but did not regulate correspondence "concerning legal matters"), but it did not. Unlike the inmates in the *Gassler* line of decisions, Murphy was not punished for the acts of speaking, writing, or giving legal advice. He was punished for the content of his letter.

Once we recognize that the issue is not one of regulating or prohibiting communication but punishing for the content of a letter permitted under the Prison's policies, the question becomes purely one of the right to free speech. As a result, it does not matter if we measure that right as a First Amendment right retained by an inmate or as a First Amendment right of a jailhouse lawyer. The right is measured under a *Turner* analysis. The Court of Appeals engaged in a proper *Turner* analysis in this case.

B. This Court Would Have to Confront Other Questions of Law and Policy, Not Discussed in the Court of Appeals' Opinion, Which Are Raised by the Petition.

Whether we characterize Murphy's letter as factual information from a lay person or as advice from a jailhouse lawyer, Murphy's communication spoke to proceedings outside the Prison's walls. By stretching its "Insolence" and "Interference with Due Process" rules to fit the

content Murphy's letter, Montana State Prison extended its authority beyond the prison and into the court room where it has no interest in order and discipline. The Prison conferred upon itself the authority to determine whether evidence offered for use at a criminal trial was "true." If the Prison's regulations are given this breadth, prison officials could punish most prisoners who offer to testify on behalf of an inmate and against a staff member. Under its application of Rule 022 (Interference with Due Process Hearings), the Prison may threaten any inmate who volunteers to offer testimony on behalf of another prisoner when that evidence alleges employee misconduct. Under its application of Rule 009 (Insolence), the Prison may threaten to punish an inmate for tendering evidence when the evidence may "harass or cause alarm in an employee," which is Rule 009's definition of insolence.

The federal courts have historically condemned and prohibited such pre-clearance by prison officials. *Cf.*, *Ex parte Hull*, 312 U.S. 546 (1941) (holding that prison officials could not screen habeas petitions and prohibit mailing those that they deemed frivolous); *Adams v. James*, 784 F.2d 1077, 1083 (11th Cir. 1986) (Clark, J., concurring in part) (noting that frivolousness and good faith are concerns of the courts and not the prison administration); *Nolan v. Scafati*, 430 F.2d 548, 551 & n.4 (1st Cir. 1970) (holding that prison could not refuse to mail an inmate's letter to the Civil Liberties Union because prison believed it contained "lies"). The truthfulness of the information proffered by Murphy is a judicial, not a penological, interest.

The Court of Appeals' narrow opinion avoided the question of whether a prison may regulate or punish an inmate's participation or attempt to participate in legal proceedings outside the prison. This Court would be faced with deciding the question of whether the inmate's participation is an interest of the courts or an interest that may be regulated by prison officials

who might prefer that the inmate's story never be told.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH *TURNER v. SAFLEY* AND RAISES NO ISSUE OF NATIONAL IMPORTANCE

The Petitioners contend that the Court of Appeals' decision conflicts with *Turner* and its progeny. They first assert that the Court of Appeals' decision abrogates this Court's holding in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977). They reason that the Court of Appeals grounded its decision in this case, in part, on First Amendment associational rights and that this creates a rule that runs contrary to *Jones*.

In *Jones* this Court upheld a prison regulation that prohibited inmates from soliciting other inmates' membership in a labor union. In the case at bar, there is no similar regulation or prohibition. Had Montana State Prison prohibited inmates from corresponding with inmates in its Maximum Security Unit, had it punished Murphy for doing so, and had the Court of Appeals found that to be a violation of Murphy's associational rights, then the Petitioners would have a complaint. But that is not what happened in this case. The Court of Appeals' decision does not conflict with *Jones*.

The Petitioners assert that the Court of Appeals' decision departs from *Turner*'s and *Abbott*'s holdings. They claim, "the Ninth Circuit's decision makes it impossible for a prison to ban inmate-to-inmate correspondence because inmates must have some method by which to exercise their independent constitutional right to exercise legal assistance." Pet. at 17. This is, of course, an exaggeration. We do not know if the Court of Appeals' decision makes it impossible because Montana State Prison has never attempted such a ban. Until it does so, this Court will have no facts upon which to evaluate the Petitioners' claim.

In contrast to the Petitioners'claim, the Court of Appeals stated that the Prison would be free to regulate Murphy's speech, as well as his activity, consistent with *Turner* and engaged in a *Turner* analysis of both. App. 8-15. The case before the Court of Appeals, however, lacked two key factors found in *Turner*. First, Montana State Prison did not regulate or prohibit inmate-to-inmate correspondence, short of inspecting letters. Thus, the Petitioners' claimed power to regulate inmate-to-inmate correspondence was not at issue. *Turner* and *Abbott* command deference to the judgments of prison officials. Montana State Prison's officials determined that it was not necessary to the safety, security, and order of the Prison to prohibit inmate-to-inmate correspondence. Those same officials determined that Murphy's letter did not disrupt or interfere with the Prison's security or order. Those are judgments entitled to deference.

Evidence was also lacking in this case. In *Turner*, this Court required evidence of the prison's asserted interests, *Turner*, 482 U.S. at 98, and struck down the prison's marriage prohibition in that case because "petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing [violent love triangles]." In the case at bar, the Court of Appeals recognized that Montana State Prison had a legitimate interest in security and order. App. p. 11. This interest was expressed, however, in the Prison's "insolence" and "interference with due process" regulations. The Court of Appeals found the evidence of the nexus between these regulations and Murphy's punishment to be "weak." App. p. 13.

Murphy had been found not guilty of violating Rule 025, "Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution." This finding is significant because only "some evidence" would have been necessary to support a guilty finding. *Superintendent v. Hill*, 472 U.S. 445, 455 (1984). In short, this case lacks the facts necessary to

address the issue that the Petitioners present.

Contrary to the Petitioners' claims, Murphy's right to correspond without fear of punishment for his letter's contents, or his right to act as a jailhouse lawyer are not absolute. The Prison remains free to regulate these activities consistent with *Turner* and *Abbott*. The Petitioners failed in the Court of Appeals because the ~~Prison had~~ not regulated those rights, not because the Court of Appeals created a new right.

Since this case was one in which an inmate was punished for the content of his permitted communication with another inmate, the Court of Appeals' analysis broke no new ground. It was fact-driven and depended in large part on the Petitioners' failure to offer evidence to demonstrate a connection between their punishment of Murphy and the penological interests they asserted.

It makes no difference whether Murphy's letter is characterized as advice from a jailhouse lawyer or the kind of advice people offer each other daily. He was punished for its contents, and the Petitioners demonstrated no rationale for the punishment.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEFFREY T. RENZ
Criminal Defense Clinic
School of Law, University of Montana
Missoula, Montana 59812
(406) 243-4823
Counsel of Record

June 2006

JEFFREY T. RENZ
DAVID C. PECK, Legal Intern
Montana Defender Project
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(406) 243-4823
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA
(HELENA DIVISION)

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, Unit Sergeant, LARRY BEARELY, Hearings officer, MICHAEL MAHONEY and MYRON BEESON Bureau Wardens, and RICHARD DAY, Department of Corrections Director Defendants.	) No. CV 95-62-H-CCL)))))) AFFIDAVIT OF) KEVIN MURPHY))))))	

STATE OF MONTANA)
:ss
County of Powell)

I, KEVIN MURPHY, being first duly sworn state:

1. I am an inmate confined at Montana State Prison, Deer Lodge, Montana.

2. On or about February 16, 1995, I was working as an inmate law clerk while confined at Montana State Prison. A copy of my work assignment is attached hereto as Exhibit 1.

3. On or about February 1, 1995, a fellow inmate, Pat Tracy, had requested my

assistance, through another inmate, on charges pending against him for assaulting a prison officer. At this time Pat Tracy was housed in the Maximum Security wing and I was unable to see him personally. On or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges pending against him. The letter attached to plaintiff's complaint as "Exhibit 1" is a true and accurate copy of this letter.

4. On or about February 17, 1995, Unit Sergeant Robert Shaw read the above mentioned letter.

5. As a result of the letter, defendant Shaw gave me three Major Misconduct Violation Reports or ("Class IIs"). In these Class IIs defendant Shaw alleged that based on the content of the letter, I violated Rules 009, 022 and 025. The Major Misconduct Violation Reports attached to plaintiff's complaint as "Exhibit 2" are true and accurate copies of those Class IIs.

6. Hearings officer Larry Bearley found me guilty of violating Rules 009 and 022 and sanctioned me to ten days suspended detention. As a result I also received three reclassification points.

7. Bureau Warden Mike Mahoney denied my appeal of the above mentioned disciplinary violations.

8. I know of other inmates at Montana State Prison who have been similarly harassed for providing legal assistance to other inmates.

FURTHER, AFFIANT SAYETH NOT.

Dated this 1st day of May, 1996.

/s/_____
Kevin Murphy

SUBSCRIBED AND SWORN to before me this 1st day of May, 1996.

/s/_____
Notary Public for the State of Montana
Residing at Deer Lodge, Montana
My Commission Expires 11-19-97

(Notarial Seal)

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA, MONTANA

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	) No. CV 95-62-H-CCL)))) SUPPLEMENTAL AFFIDAVIT) OF KEVIN MURPHY)))))

STATE OF MONTANA)
:ss
County of Powell)

Before the undersigned, a notary public for the State of Montana, personally appeared Kevin Murphy, who, having been duly sworn, on his oath deposes and says that this affidavit is made on his personal knowledge, and that if he were to appear as a witness in the above-captioned matter, he would competently testify as follows:

1. I am from Butte, Montana.

2. I am housed on the high security side of Montana State Prison.

3. I have assisted inmates in both the high security and maximum security units. This was true even during the period when the high security inmates did not go to maximum security. Although we could not go to the maximum security unit, we could still correspond with and assist inmates there. I had never been disciplined for doing this. All of this was done with the knowledge and approval of the library director and other members of the prison staff.

4. No one ever directed that I, or any other law clerk, stop providing or continuing to provide assistance to maximum security inmates or inmates in administrative segregation (lockdown).

5. On the high security side the process of providing assistance to inmates was informal. Sometimes inmates wanting legal assistance would send in a kite to the library director, Dave Beatty, and he would assign those inmates to a law clerk. Sometimes inmates would walk-in to the library during library hours and request assistance from Dave Beatty. In those cases the process was "first come, first served" unless the inmate asked one of the law clerks specifically for help. Finally, inmates sent in written requests addressed to a particular law clerk and that law clerk would respond directly.

6. I have a history of assisting Pat Tracy. Beginning in the mid-1980's, I assisted Pat in my capacity as an inmate law clerk with numerous writs and appeals in both the state and federal courts, including an appeal to the 9th Circuit.

7. In early 1995, I had been out of prison for a short time before Pat asked for my assistance. On or about February 1, 1995, I received a request from Pat for my assistance. I began to investigate the assault charges against Pat.

8. Through my investigation I found that Officer Galle had made homosexual comments to other inmates and that a petition was circulating accusing him of wrongful conduct and requesting his transfer.

9. On or about February 16, 1995, I wrote a letter to Pat Tracy to try and help him and get the charges dropped to a misdemeanor.

10. I was aware that Montana State Prison officials would read the contents of my letter to Pat Tracy. I did not believe that Officer Galle would read the letter. In fact, to this day, I do not think that Officer Galle has seen it.

FURTHER, AFFIANT SAYETH NOT.

Dated this 12TH day of July, 1996.

/s/_____
Kevin Murphy

SUBSCRIBED AND SWORN to before me this 12th day of July, 1996.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

/s/_____
Notary Public for the State of Montana
Residing at _____, Montana
My Commission Expires _____

(Notarial Seal)

No. **99-1613**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ROBERT SHAW, LARRY BEARLEY,
MICHAEL MAHONEY, MYRON BEESON,
AND RICHARD S. DAY,

Petitioners,

-v-

KEVIN MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Kevin Murphy asks for leave to proceed without payment of costs and to proceed in forma pauperis. Respondent was granted leave to proceed in forma pauperis in the United States District Court for the District of Montana and in the United States Court of Appeals for the Ninth Circuit. Respondent submits his Affidavit in Support of Motion for Leave to Proceed *In Forma Pauperis*, filed in the United States District Court. His current affidavit and his current statement of account will be submitted when received from the Great Falls Regional Prison.

DATED: June 6, 2000

JEFFREY T. RENZ, Attorney for
Respondent, Counsel of Record.

FILED

JAN 30 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN MURPHY, individually and on behalf of others similarly situated, Plaintiff-Appellant, vs. ROBERT SHAW, Unit Sergeant; et al., Defendants-Appellees.	No. 97-35989 DC# CV-95-62-CCL Montana (Helena) ORDER

Appellant's motion to proced in forma pauperis is denied as unnecessary because appellant's in forma pauperis status continues on appeal. See Fed. R. App. P. 24(a). Pursuant to 28 U.S.C. §§ 1915(b)(1) and (2), however, appellant must pay the full amount of the filing and docketing fees for this appeal when funds are available in appellant's account.

Consequently, within 21 days of the entry of this order, appellant shall complete and **file with this court** the enclosed authorization form, which directs the prison officials at appellant's institution to assess, collect and forward to the court the $105 filing and docketing fees for this appeal on a monthly basis whenever funds exist in appellant's trust fund account. These fees will continue to be collected regardless of the date or manner of disposition of this appeal. 28 U.S.C. §§ 1915(b)(2) and (e)(2).

If appellant fails to comply with this order, the appeal will be dismissed automatically by the Clerk under 9th Cir. R. 42-1.

If appellant complies with the order, the briefing schedule is reset as follows: appellant's opening brief is due March 9, 1998; appellee's answering brief is due April 8, 1998; and the optional reply brief is due within 14 days after service of appellee's brief.

For the Court

Patricia Plunkett
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

clerk/1.98/97.35989

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

KEVIN MURPHY, individually and on behalf of all other persons similarly situated, Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	No. CV 95-62-H-CCL AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF MONTANA)
:ss
County of Butte-Silverbow)

I, Kevin Murphy, being first duly sworn, depose and say that I am the Plaintiff in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress; that the issues which I desire to present on appeal are set out in the Civil Appeals Docketing Statement.

I further swear that the responses to the questions and

instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

ANSWER: No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

ANSWER: _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER: AUGUST 1994 - $100.00 WEEK

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

ANSWER: NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

ANSWER: _____

3. Do you own any cash or checking or savings account?

ANSWER: NO

a. If the answer is yes, state the total value of the items owned.

ANSWER: _____

4. Do you won any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: NO

a. If the answer is yes, describe the property and state its approximate value.

ANSWER: _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dawn T. Murphy

SUBSCRIBED and SWORN to before me this 30 day of October,

1997.

NOTARY PUBLIC, State of Montana
Residing at BUTTE MONTANA
My Commission Expires: 4/98

ATTACH A COPY OF YOUR INSTITUTIONAL TRUST FUND ACCOUNT STATEMENT

Supreme Court, U.S.
FILED
JUN 2 0 2000
CLERK

(2)

No. 99-1613

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; and RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners and Respondent agree on one thing: "[W]hether Murphy was or was not acting as a law clerk is immaterial." Opp'n 5.[1] Whatever job Respondent held at Montana State Prison is, in and of itself, not material. What *is* material is whether Respondent was *giving legal advice* to his fellow inmate Tracy and, more importantly, whether prisoners like Respondent have an independent and free-standing right to provide legal assistance to other inmates protected by the First Amendment. Remarkably, Respondent denies that his letter was intended to give legal advice – a position not only flatly inconsistent with his arguments below but also one that effectively abandons the reasoning of the Ninth Circuit's decision – and adopts a tack that runs squarely into *Turner v. Safley*, 482 U.S. 78 (1987).

---

[1] As discussed below, the linchpin of the Court of Appeals' decision was Respondent's status as a law clerk. However, it is plain from the court's analysis that the right relied upon is a constitutional entitlement on Respondent's part to give legal advice – an entitlement that is not necessarily dependent upon what job an inmate holds. The Court of Appeals decision may fairly be understood to apply to all inmates who seek to give legal assistance to other inmates, regardless of the inmate's position at the prison. Thus, while the Ninth Circuit clearly erred in deeming Respondent to have served in a law clerk capacity with respect to Murphy, the reasoning below is not restricted by its finding in this respect.

REPLY ARGUMENT

1. Respondent contends that he was not providing legal advice to Tracy. This argument cannot be reconciled with his arguments to the lower courts or with the Court of Appeals' analysis.

Before the District Court Respondent alleged that, "acting as a law clerk," he wrote to Tracy, "giving him advice and assistance regarding charges pending against him." Compl. at 3. He further stated in an affidavit that "[o]n or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges against him." Opp'n App. 2. The District Court rejected the contention that Respondent had been acting as a law clerk and, in granting Petitioners summary judgment, analyzed his letter under constitutional standards applicable to simple inmate-to-inmate correspondence, "without consideration of any privilege that law clerk status might provide." Pet. App. 24-25. Before the Ninth Circuit, Respondent again pressed the notion that "the essence of [his] communication was, 'don't plead guilty, you may have a defense predicated upon the guard's reputation for treatment of other inmates.' " Appellant's Br. at 17. He then asked the Court of Appeals to reverse the District Court's conclusion that he was not acting as a law clerk when he wrote to Tracy. *Id.* at 43.

The Ninth Circuit accepted Respondent's argument, finding "the relevant facts" to be "undisputed: Respondent is a law clerk; his letter to Tracy contained legal advice; as applied to legitimate law clerk correspondence, Rules 009 and 022 are an 'exaggerated response' to the

Prison's interest in security and order, and thus impermissibly infringe Respondent's First Amendment rights." Pet. App. 15. Indeed, the Court of Appeals' opinion hinged on his status as a law clerk. *Id.* 7-8. Only because it deemed Respondent to enjoy such status did the court analyze his correspondence to determine the extent to which the prison infringed upon a newly-coined First Amendment right to render legal assistance to another inmate. It accordingly commented at the start of its substantive analysis that "[t]he viability of Respondent's First Amendment claim turns on the application of two established legal principles" – the first of which was a prior circuit determination "that inmates have a First Amendment right to assist other inmates with their legal claims." *Id.* 6. The court continued on to scrutinize the prison's actions in light of the four *Turner* factors and concluded that, although the prison's policy was logically related to the institution's legitimate safety and security concerns, those concerns were "at a low ebb when the correspondence in question is *legal advice*." *Id.* 12 (emphasis supplied); *see also id.* 13 (Respondent had no alternative methods by which he could "render legal assistance to maximum security inmates"); *id.* 13-14 ("prison officials could continue to monitor correspondence and discipline law clerks for any improper material that does not relate to legal action").

2. Respondent's justification for the Ninth Circuit decision is instead a broad assertion that prisons may not censor inmate-to-inmate correspondence based upon its content. *See* Opp'n 8 ("[Respondent] was punished for the content of his letter"). However, the content of inmate communications weighed heavily in *Turner* where this

Court held that prisons may *prohibit* inmate-to-inmate correspondence. Inmates, for example, may discuss escape strategies, plan disturbances or make threats against staff or other inmates – all of which would "threaten the core functions of prison administration, maintaining safety and internal security." *Turner*, 482 U.S. at 92. Contrary to Respondent's apparent position, implicit in the greater right to prohibit inmate-to-inmate correspondence is the lesser right to permit such communications subject to regulations of the type employed at MSP. The Court of Appeals effectively acknowledged this corollary by finding it necessary to recognize a free-standing constitutional entitlement for one inmate to give legal advice to another; i.e., were Respondent correct, the Ninth Circuit's reasoning was largely, if not entirely, beside the point.

Respondent's recasting of the basis for the Ninth Circuit's decision is betrayed tellingly by his assertion that no conflict exists between the decision and those in other circuits. Opp'n 6-8. The Court of Appeals nevertheless conceded that its holding conflicted with rulings from the Sixth, Eighth, and Tenth Circuits. Pet. App. 9 n.6. Only by modifying the rationale for the result below can Respondent argue that no inconsistency exists. The Ninth Circuit's opinion, no less than his own prior arguments, speaks for itself, and the decision below cannot be sustained unless the Court of Appeals was correct in fashioning a new constitutional doctrine.

CONCLUSION

The Ninth Circuit unequivocally concluded that "inmates have a First Amendment right to assist other inmates with their legal claims" and that "[t]he provision of legal assistance to fellow inmates is an activity protected by the First Amendment." Pet. App. 6, 9. This conclusion is the foundation for its decision. The issue before the Court is whether that foundation is sound.

For the foregoing reasons and the reasons in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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(9)

No. 99-1613

Supreme Court, U.S.
FILED
NOV 13 2000

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 6, 2000
Certiorari Granted September 26, 2000

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Oct. 24, 1995	Complaint for declaratory and injunctive relief. (mgs)
Dec. 7, 1995	Findings and recommendation by Magistrate Judge Leif B. Erickson concerning motion to dismiss [5-1], recommending it be denied. Objections to findings and recommendation due date: December 22, 1995. (cc: all counsel) (mgs)
Feb. 26, 1996	Order by Judge Charles C. Lovell adopting findings and recommendations motion FINDINGS AND RECOMMENDATION [6-1], denying deft's motion to dismiss [5-1] (cc: Renz, Ohler, LBE, CCL) (dmz)
March 14, 1996	ANSWER by defendants to [3-1]; jury demand (mgs) [Entry date 03/15/96]
May 31, 1996	STATEMENT of uncontroverted facts by plaintiff in support of [13-1] (mgs) [Entry date 06/10/96]
May 31, 1996	AFFIDAVIT of Kevin Murphy re [13-1] (mgs) [Entry date 06/10/96]
July 8, 1996	MOTION by defendants for summary judgment (mgs) [Entry date 07/17/96]
Aug. 2, 1996	STATEMENT of disputed issues by plaintiff in support of [32-2] (mgs) [Entry date 08/07/96]
Aug. 2, 1996	AFFIDAVIT of Pat Tracy re [32-2] (mgs) [Entry date 08/07/96]
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Aug. 2, 1996	REQUEST by plaintiff for judicial notice (mgs) [Entry date 08/07/96] [Edit date 03/05/97]
Aug. 2, 1996	MEMORANDUM/BRIEF by plaintiff in support of request to take judicial notice [37-1] (mgs) [Entry date 08/07/96] [Edit date 03/05/97]
Feb. 26, 1997	FINDINGS AND RECOMMENDATION by Magistrate Judge Leif B. Erickson concerning motion for summary judgment [24-1], recommending it be granted as to pltf's claim of denial of access to the courts & the balance denied; motion for summary judgment [13-1], recommending it be denied; and ORDER that pltf's motion to certify class [16] is DENIED. Objections to F/R due date: 10 days after receipt. (cc: all counsel) (mgs) [Entry date 03/05/97]
April 3, 1997	OBJECTIONS by defendant to Findings and Recommendation [40-1] (dmz) [Entry date 04/04/97]
April 3, 1997	OBJECTIONS by plaintiff to Findings and Recommendation [40-1] (dmz) [Entry date 04/04/97]
Sept. 10, 1997	ORDER by Judge Charles C. Lovell granting Deft's motion for summary judgment [24-1], Denying Pltf's mtn for class certification, denying Pltf's mtn for summary judgment [13-1], adopting FINDINGS AND RECOMMENDATION [40-1], Pltf's complaint is dismissed and case terminated (cc. Renz, Ohler, CCL, GR, State Reporter, Frank Adams) (tlh) [Entry date 09/23/97]

Sept. 23, 1997	JUDGMENT by Judge Charles C. Lovell – Defts' mtn for sum jgm is granted, pltf's mtn for sum jgm is denied. Pltf take nothing, complaint dismissed, and all relief is denied. Case terminated J/O Book Vol 22, pg 686 (cc: Renz, LBE, Ohler, CCL, GR) (tlh) [Entry date 09/24/97] [Edit date 09/24/97]
Oct. 23, 1997	NOTICE OF APPEAL by defendant from Dist. Court decision, [52-2] and order [cert copies to Renz, Ohler, Court of Appeals) (tlh) [Entry date 10/27/97]
Oct. 31, 1997	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): No. Setting schedule as follows: appellant's opening brief is due 12/10/97; appellees' brief is due 1/9/98; appellants' reply brief is due 1/23/98; [97-35989] (sm)
March 2, 1999	Filed order (Deputy Clerk: GB) The DC indicated that aplt Kevin Murphy had been released on parole. See order at 2 (D. Mont. filed 9/10/97). Because Mr. LMurphy's release on parole raises issues of mootness, see e.g. Reimers v. Oregon, 863 F.2d 630, 632 (9th Cir. 1988), he is hereby directed to inform this court, within 7 days of filing of this order, of his current status: Is he currently incarcerated? If so, where? Is he currently charged or has he been convicted of felonies allegedly committed subsequent to his release on parole? Has his parole been revoked? (phoned out to aplt counsel) [97-35989] (em)

March 9, 1999	Filed Appellant's (faxed) response to clerk order setting response; served on 3/5/99 FAXED PANEL [97-35989] (hard copies received 3/9/99) (em)
March 12, 1999	ARGUED AND SUBMITTED TO Betty B. FLETCHER, Stephen R. REINHARDT, Sidney R. THOMAS [97-35989] (jmk)
Nov. 4, 1999	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed, Written, Signed, Published. Betty B. FLETCHER, author; Stephen R. REINHARDT; Sidney R. THOMAS.) FILED AND ENTERED JUDGMENT. [97-35989] (em)
Nov. 17, 1999	Filed motion and deputy clerk order: (Deputy Clerk: EM) granting aples' motion & order to extend time to file a petition for rehearing [3793263-1] petition for rehearing due 11/26/99. (Motion recvd 11/17/99) [97-35989] (em)
Nov. 26, 1999	[3798457] Filed original and 50 copies Appellees' petition for rehearing with suggestion for rehearing en banc 13 p. pages, served on 11/24/99 PANEL AND ACTIVE JUDGES [97-35989] (em)
Jan. 7, 2000	Filed order (Betty B. FLETCHER, Stephen R. REINHARDT, Sidney R. THOMAS): The petition for rehearing is denied and the petition for rehearing en banc is rejected. [97-35989] (em)
Jan. 18, 2000	MANDATE ISSUED [97-35989] (jjf)

April 12, 2000	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1613 filed on 4/6/00. [97-35989] (em)
Oct. 2, 2000	Received notice from Supreme Court, petition for certiorari GRANTED on 9/26/00. Supreme Court No 99-1613 (PANEL) (em)

MONTANA STATE PRISON
POLICY STATEMENT

TITLE: INMATE DISCIPLINARY POLICY

NUMBER: MSP 15-001

EFFECTIVE DATE: January 1, 1985
REVISED: January 8, 1988 – Rev. 1
September 1989 – Rev. 2

AUTHORITY: MSP 01-001, Organization and Responsibility

OBJECTIVE: To provide a means of maintaining discipline and enforcing necessary rules within the institution: to ensure that prisoners are provided fair, timely, and impartial disposition of charges alleging violations of rules, based on proceedings that conform to state statutes, administrative rules, and due process requirements for prison disciplinary matters, and to set forth certain other possible consequences of misconduct.

POLICY: The object of the disciplinary policy is to correct behavior with the least severe actions necessary to achieve that end. Rule violations are divided into three categories. A summary action results when the inmate admits violating a rule and agrees to a summary disposition, thereby waiving his right to a hearing. A Class III violation is a minor violation, and the hearing is handled by the Housing Unit Team. Whenever a Class II or III offense is alleged to have been committed, the accused inmate shall be subject to the institutional disciplinary proceedings as outlined in this policy.

DEFINITIONS: As used in this policy, the following definitions apply:

Class II: Those institutional infractions which are termed a major misconduct and are considered serious.

Class III: Those institutional infractions which are termed a minor misconduct and are considered less serious.

PROCEDURES:

A. General Provisions:

Following are descriptions of prisoner behavior which is prohibited and subject to disciplinary sanctions. The left-hand column lists and defines the violation. Any behavior that fits the definition is misconduct. In the right-hand column are specific examples of behavior fitting under the rule violation. These are just *examples*. Other actions that fit the violation definition are also misconduct even though they are not mentioned in the right-hand column. The violations are divided into major and minor misconduct.

In addition to the violations which follow, three other kinds of charges are possible: (1) Accomplice; (2) Attempt, or (3) Conspiracy to commit a specific violation. The first number of the code for Accomplice to any rule violation should be number 1. The first number of code for Attempt should be number 2, and the first number of the code for Conspiracy is number 3. (Example: Attempted Escape would be coded 207).

1. **Accomplice** – a prisoner who assists another to commit a specific misconduct or, after it is committed, conceals the violation from the authorities.

2. **Attempt** – a prisoner intends to commit a specific rule violation and does something towards committing it, even though he may not have succeeded.

3. **Conspiracy** – a prisoner intends to commit a specific violation and agrees with at least one other person to commit the violation. No action is necessary.

Violations marked with an asterisk (*) are mandatory "Temporary Lockup" charges, except that the Shift Commander may at his discretion place the inmate on present status if he determines that the inmate is not a threat to the security and orderly operation of the institution. All charges not marked with an asterisk are normally non-lockup offenses.

Temporary Lockup: No inmate shall be disciplined by segregation or otherwise until after a hearing as described in these rules, unless it is necessary to preserve the immediate security or stability of the institution. Violations marked with an asterisk (*) are mandatory "temporary lock-up" charges as it is determined these offenses constitute a threat to the security and orderly operation of this institution.

Many rule violations necessarily include other less serious violations. A lesser included violation would contain some but not all elements of the greater charge. For example, the "lesser included" violations of escape are planning and/or attempting escape. If an inmate is charged with misconduct, and the evidence does not support the particular violation charged but does establish a lesser included violation the Hearing Officer has the authority to find the inmate guilty of the lesser included violation.

B. Class II Violations and Descriptions:

001 *Committing Homicide:
Causing the death of another person by any means.

002	***Assaulting Another Person**: Physical attach [sic] on, or intentional non-consensual contact of another person, done either in anger, or with the purpose of abusing or injuring another. Injury is not necessary, but contact is.	Attack by one or more persons; striking with feces or other objects; physical resistance of, or interference with an employee. (Note that the victim of an assault should not be charged with a violation of this rule.)
003	***Fighting with Another Person**: Physical confrontation between two or more persons, including a swing and miss, done with anger or intent to injure.	Fight between inmates, whether with fists, broom handles, or other weapons.
004	***Threatening Another Person with Bodily Harm**: Words, actions, or other behavior expressing an intent to injure, which intends to place another in fear of being assaulted; includes attempted assault.	Threats of sexual assault made by one inmate to another inmate; writing threatening letters to another person.
005	**Felony**: Any act that would be a felony under state or federal law is also a major misconduct.	45-5-202 Aggravated Assault.

006	***Sexual Assault**: Sexual penetration of, or sexual contact with another person without that person's consent; non-consensual physical contact for sexual purposes.	Rape; intentional touching of sexual area (e.g., buttocks, breasts, genitals) without consent; kissing or embrace without consent of one who is kissed or embraced.
007	***Escape; Attempt to Escape**: Leaving or failing to return to lawful custody without authorization.	Leaving from Montana State Prison, Swan River Forest Camp, pre-release center, or trip to hospital; hiding from authorities, even if still on prison property, would be Attempted Escape (#207).
008	***Disobeying a Direct Order**: Refusal or failure to follow a valid, reasonable order. Violation of an institutional policy not specifically enumerated here.	Refusal to submit to a shakedown; refusal to lock up when ordered to do so. Refusal to give name and number to a state employee; refusal to give a UA upon request; repeated violation of posted Housing Unit Rules.
009	**Insolence**: Words, actions or other behavior which is intended to harass or cause alarm in an employee.	Cursing; abusive language, writing or gestures directed to an employee.

010	**Counterfeiting, Forging, or Unauthorized Reproduction of any Signature, Document, Article of Identification, Money, Security, or Official Papers**: Knowingly possessing a falsified or altered document; altering or falsifying document with the intent to deceive or defraud.	Possession of furlough or parole papers, etc., which is represented to be true. Possession of an altered identification card.
011	***Incite to Riot or Strike, Rioting or Striking**: Encouragement of actions to disrupt or endanger the institution, persons or property; participating in such action.	Encouraging a group demonstration or participating; hostage taking.
012	***Possession of Dangerous Contraband**: Unauthorized possession of weapons, explosives, acids, caustics, materials for incendiary devices or escape materials; possession or "critical" tools and materials as defined by policy.	Gasoline, sulfuric acid, lye, prison-made knives, pipe bomb.

013	**Substance Abuse**: Possession, use, selling or introduction, or under the influence of any intoxicant, inhalant, controlled substance or imitation (as defined by Montana statutes), alcoholic beverage, marijuana, or any other substance which is used to cause a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system; unauthorized possession of prescription medication; possession of narcotic paraphernalia.	Possession and/or attempt to sell medication controlled by the Infirmary, narcotic paraphernalia including such items as needles, syringes, roach clips, pipes or imitation controlled substances.
014	***Setting a Fire**: Intentionally or recklessly starting a fire.	Setting books, blankets, or mattress on fire.
015	**Possession of Money or Currency**: Possession of unauthorized amounts of cash or money from an unauthorized source. Money is defined as either cash or negotiable instrument.	Any cash over the sum of $1.00.

016	**Destruction of State Property**: Any destruction, removal, alteration, tampering, or other misuse of state property which has a replacement value of more than $5.00.	Tampering with or blocking any security or locking device, breaking windows, destroying blankets or mattresses.
017	**Unauthorized Area**: Being present in a room, cell or living quarter not assigned. Being anywhere without the proper authorization; being absent from where required to be.	Inmate in a cell that is not assigned to him. Inmate being present in the Gym when he is supposed to be in the Library. Inmate missing work assignment without permission.
018	**Fraudulent Claims for Inmate Programs**: False information for personal gain from good time earnings, inmate legal aid, or the contingency fund.	Knowingly providing false information to receive an indigent package.
019	**Theft or Possession of Stolen Property**: Any unauthorized taking of another person's property.	Possession of a staff member's personal items, or possession of any item reported to be stolen. Unauthorized possession of state materials, valued over $5.00.
020	**Bribery of an Employee**: Offering to give or withhold anything to persuade an employee to neglect or perform favors.	Giving or offering to give hobby to an employee.

021	**Gambling, Possession of Gambling Paraphernalia**: Playing games or making bets for money or anything of value or other materials commonly associated with wagering.	Possession of dice or betting slips; possession of lottery material; possession of sweepstake materials; participating in a sport pool for Canteen items.
022	**Interference With Due Process Hearings**:	Intimidating or tampering with a informant or witness, tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff which could result in a disciplinary action. (This violation should not be charged for as a retaliation for the writing of a grievance.)
023	**Sexual Misconduct**: Consensual touching of the sexual or other intimate parts of another person done for the purpose of gratifying the sexual desire of either party; indecent exposure; verbal abuse of a sexual nature directed at another person.	Excessive kissing, hugging or unauthorized touching of visitors. Possession of apparel designed for the opposite sex (e.g., nylons, and/or women's undergarments). Prostitution and/or sexual favors for personal gain.

024	**Failure to Abide by Consequences or Conditions of a Class II or III Disciplinary Disposition**: Breaking a condition of restitution or other sanction.	Failure to comply with a summary action; being in the dayroom when on a restriction or room lockup without permission.
025	**Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution**: Purposefully engaging in acts which disrupt the institutional security or orderly operation. Interfering with an employee in the performance of his/her duties.	Interfering with an institutional count; missing count; interfering with a shakedown; knowingly interfering with the intent to disrupt an employee conducting a count or performing any routine security procedure.
026	**Transferring, Soliciting, or Accepting Money or Personal Property**: From another inmate, visitor, staff, or general public without authorization. Value of $10.00 or more.	Inmates loaning a stereo or T.V. to another inmate. Receiving money or valuables from a visitor.
027	**Violating the Provisions of a 10-Day Furlough**:	Failure to report to a parole officer. Drinking or using drugs while on a 10-Day Furlough.

C. Disciplinary Report Procedure – Class II

1. Responsibility of Reporting Officer: In the event of any Class II offense infraction, the witnessing staff member will prepare and submit an infraction report. The infraction report will include the following:

a. The specific rule alleged to have been violated.

b. The time and place of the incident.

c. A detailed description of the alleged violation.

d. Names of witnesses.

e. A description of immediate action taken.

2. The description of the incident must include the actions of the inmate, not the writers conclusions about those actions. For example; "I saw Inmate X punch Inmate Y" should be written, not "I saw Inmate X fighting with Inmate Y". The Hearing Officer will decide if there is an assault, fight or horseplay. The writer of the report should describe what he saw, not his conclusions about what he saw.

3. All reports will be signed by the reporting staff member and submitted promptly to the Shift Supervisor. There is no precise time limit between the time a violation occurs and the time the report must be written, although a report should be written as soon as possible to ensure that events are accurately recorded and remembered. Whenever possible, it should be done before the end of the shift or on the next regularly scheduled shift.

4. The shift supervisor will gather all reports from the listed witnesses to the violation.

5. The reporting staff member will gather all evidence and submit it to his supervisor.

D. Processing of Reports and Written Notification:

Directly after a major misconduct rule infraction, the reporting staff member or Unit Supervisor will forward

the report to the Shift Commander. The Shift Supervisor will comply with the following procedures:

1. Screen the report to ensure that all necessary information is included and that the report is complete to the extent of clearly defining the fact that a Class II violation has been committed.

2. Ensure that all necessary evidence and reports are preserved and gathered.

3. Properly investigate the report, which will include informing the inmate so charged if mandatory temporary lockup is required. The Shift Supervisor, at his discretion, may place the inmate back in his respective unit if he feels the inmate is not a threat to the security and orderly operation of the institution.

4. Read the violation report to the inmate.

5. Complete the *Disposition of Inmate* portion of the *Major Misconduct Violation Report*.

6. If the inmate is placed on temporary lockup he will have a disciplinary hearing within 72 (seventy-two) hours, excluding weekends and holidays.

7. Inform the inmate of his right to a hearing investigator if one *is needed*. A hearing investigator *is needed* only if:

   a. The inmate is placed on temporary lock-up.

   b. The inmate cannot understand the charges and/or the disciplinary process.

8. Complete the notice of hearing section of the violation report. The shift supervisors will assign a date and time for the hearing in accordance with a schedule provided by the Hearing Officer for those inmates placed on temporary lock-up. Those inmates not placed on temporary lock-up will be notified by

the Hearing Officer of the time and place of their hearing.

9. Obtain the inmates signature on the violation report acknowledging he has received a copy. Note: If the inmate refuses to sign, note that he refused to sign and have another staff member witness that a copy of the report was given to the inmate.

10. All evidence will be properly marked and handled as outlined in this section and turned over to the Hearing Investigator or held in the evidence locker in Main Control.

11. Ensure that all personal belongings of the inmate being moved to the temporary lockup area are secured. If the inmate lived in a single cell, the housing unit staff will be notified to secure his cell within two hours of placement in temporary lockup. The Shift Supervisor will note the time and person notified in the disciplinary report. If the inmate lived in a double cell or other multiple housing area, the Shift commander or Unit Supervisor will designate no less than two officers to collect, inventory, and transport the belongings to the property storage area.

12. Ensure that all evidence, reports, and statements are completed and turned into the Hearing Investigator or Security Manager.

Conditions of Temporary Lockup: Conditions as defined in Policy MSP 15-002, Temporary Lockup.

E. Hearing Investigator Responsibilities:

It will be the duty of the hearing Investigator to investigate each major misconduct report when assigned by the Shift Supervisor of the Hearing Officer. The investigation will include the following:

1. Interview inmate; Pinpoint any discrepancies between inmate's version and the report. The inmate's statement, whether written by the inmate or transcribed by the investigator, must be signed by the inmate.

2. Take names and numbers of all witnesses requested and specific questions which the inmate wishes to have asked.

3. If there are discrepancies between the inmate's version and the misconduct report, or if further information is needed, interview and put statement of reporting officer in writing, with special attention to the areas of discrepancy. The fact that the inmate totally denies the report is not a discrepancy. A discrepancy means a disagreement as to words used, location of an act, time of day, color of work clothing, etc.

4. Interview requested witnesses and write down their statements. If any are not interviewed, or if questions which were requested are not asked, the reason must be given in writing. (Irrelevance or repetition are justifications for not taking statement, but insufficient time is not). The witness' statements, whether written by the witness or transcribed by the Hearing Investigator should be signed by the witness.

5. Interview all other known, relevant witnesses and write down their statements.

6. Obtain copies of documents requested by the inmate.

7. To the extent possible, resolve the factual questions in the different versions of the incident by checking out the inmate's alibi.

8. Be certain that all required physical evidence and documents are with the report, e.g., drug testing

report, picture of physical evidence if the evidence will not be at the hearing, room inspection sheet, etc.

9. The Hearing Investigator's report must be in writing, and all statements must be legible. If a witness' handwriting is illegible, the Investigator should type or print the statement (or ask the inmate to do this) and then have the inmate sign the statement.

10. Give witness' statements and misconduct report to Hearing Officer for scheduled disciplinary hearing.

11. If the Hearing Investigator promises confidentiality to a witness, it should be made clear in the written statement so that the Hearing Officer will not reveal that portion to the inmate. Confidentiality may be promised only when revealing the informant's identity would present a hazard to institutional or personal safety. The final determination as to whether confidentiality is required will be made by the Hearing Officer. This should be made clear to the witness.

12. Assign dates for hearings for those inmates not on temporary lockup and notify those inmates. Unless the inmate waives the 24-hour notice, the hearing will be no sooner than 24-hours from the time the inmate received his copy of the misconduct report.

F. Schedule of Hearings:

1. Inmates placed in temporary lockup will see the Shift Supervisor as soon as possible (see Page 8 number 3).

2. Inmates not placed in temporary lockup will be scheduled for a hearing within ten (10) days with allowance for the twenty-four-hour (24) written notification period.

G. Hearing Officer Responsibilities:

1. The Hearing Officer must determine if all necessary evidence has been gathered, weigh the credibility of all witnesses, determine the facts in the case, and decide whether those facts amount to alleged misconduct.

2. To be impartial, the Hearing Officer's decision will be based only on the evidence presented at the hearing and only on that evidence relating to the misconduct charge or its lesser included violation. Thus, the Hearing Officer shall not have any contact with witnesses except at the hearing.

3. The Hearing Officer shall allow the inmate to give his side of the incident, shall conduct the hearing in an orderly manner, and shall clearly describe the inmate's rights. (This does not mean, however, that the inmate must be allowed to talk indefinitely; relevance and repetition are always a consideration). The Hearing Officer shall explain to the inmate the decisions that are being made and the reason for them. This explanation will be given booth verbally and in writing.

G. Conduct of Hearing:

1. The Hearing Officer is in charge of the hearing and is entitled to respectful behavior from all persons present. Anyone – staff, inmate, or observer – who does not follow the direction of the Hearing Officer and disrupts the proceedings, may be requested to leave. The Hearing Officer cannot be forced to decide a case on insufficient information. The Hearing Officer has the authority and discretion, as well as duty, to re-list a case and order further investigation when warranted. If the hearing is continued to a later date, the

Hearing Officer may continue the temporary lockup, or release those on temporary lockup as he deems necessary.

2. All disciplinary hearings will be held in the hearing room scheduled by the Hearing Investigator.

3. The Hearing Officer will assure that the accused inmate is competent to understand the charge(s) against him, the proceedings that are taking place and that the inmate is able to participate therein. He may order a postponement of the hearing to secure a report on the competence of the inmate, or take such action as will assure the fairness and orderliness of the hearing.

4. The accused inmate shall be present at all stages of the hearing. The opportunity to be heard in person is the inmate's right. He may waive this and any other right, as long as he understands what the waiver means. The inmate may not be forced to have a hearing or to make a statement if he does not wish to.

   If an inmate fails or refuses to appear at a hearing after proper notice has been given, the Hearing Officer may make a decision on the basis of the misconduct report and any other available evidence and may find the inmate guilty. The Hearing Officer may make a finding of guilty if the evidence supports the charge, and may impose a sentence. Conversely, if the evidence does not support the charge or a lesser violation, the inmate must be found not guilty – even though he has failed to appear. The Hearing Officer must note the inmate's failure or refusal to appear and note that proper notice was given. Even if an inmate waives his right to be present at the hearing or fails to appear, he will still be given a copy of the misconduct hearing report.

5. Due to the availability of a hearing investigator to interview and obtain statements from witnesses, the physical presence of a witness at a hearing will normally not be necessary. A complete written statement may be obtained from the witness. The Hearing Officer may, in certain situations, request a witness to personally appear at the hearing to present his testimony or respond to questioning by the Hearing Officer. If direct eye-witness testimony conflicts, the Hearing Officer should interview the witnesses involved. The personal appearance by a witness at a hearing is a matter within the discretion of the Hearing Officer.

   Any failure to call a witness or to ask questions presented by the inmate to a witness must be noted in the record, and the Hearing Officer must give specific reasons for the decision to exclude those questions or witnesses.

6. The Hearing Officer must reach a decision on only the evidence presented at the hearing and only that evidence which is related to the specific misconduct charged. This decision shall be in writing and state briefly the specific evidence relied on to reach the finding of guilty or not guilty.

7. If the inmate is found guilty, the Hearing Officer may review the inmate's file, allow the inmate an opportunity to comment on the sanctions, and consider any other relevant information in determining what punishment is appropriate. Should the guilty finding require that a previously suspended sentence now be imposed by the Hearing Officer, it must also be imposed and added to the new sentence. Once the sentence is noted on the hearing report, the Hearing Officer shall sign the report and have the inmate sign it.

8. If requested by the inmate, the Hearing Officer will advise him of the appropriate appeal procedures.
9. If an inmate is found not guilty, the inmate shall be reinstated to his previous status, and all reports pertaining to the charges shall be expunged.

H. Hearing Officer Authority:

For all major misconduct (Class II) Offenses as outlined in this section, the following disposition (s) may be imposed:

1. Refer to federal or state authorities for possible prosecution.
2. Confinement in the Detention area for a period not to exceed ten (10) consecutive days. Credit for time served on a temporary lockup status for the offense under consideration may be granted at the Hearing Officer's discretion.
3. Confinement in max custody for up to 30 days.
4. Loss of visiting privileges with a particular visitor or loss of all visiting privileges for up to 180 days for violations that occur in connection with the visiting procedures.
5. Confinement to room or cell for not more than 15 days. Inmates so confined may participate in work or school assignments, visits and normal meal periods. The Hearing Officer may remove televisions, radios and other personal property during these 15 days.
6. The Hearing Officer may confiscate TV's, radios or other personal property used to conceal controlled substances or other contraband.
7. Restitution for any property not exceeding the sum assessed by the Associate Warden of Administration.

8. Recommendation to the appropriate reclassification committee for reconsideration or review of custody classification and/or program changes.
9. Recommendation to the Warden for forfeiture of earned good time.
10. Loss of any privilege created by policy for violations that occur in connection with an institutional policy.
11. Increase in custody. Inmate will be removed from his assignment if the new custody level does not allow the inmate to be assigned to a certain area. (Reviewed by the classification committee in a period not to exceed 30 days.)
12. "Unassigned unsatisfactory status" for violations that occur in connection with an inmate's assignment. (Reviewed by the classification committee in a period not to exceed 30 days.)
13. Suspend the sanction imposed for a period not to exceed six (6) months pending good behavior.
14. A combination of the above.
15. Reduction of the charge to a lesser included charge as long as the evidence supports such charges.

J. Appeal for Major Misconduct:

1. The inmate must notify the Hearing Officer at the time of the hearing of his intent to appeal.
2. An inmate may appeal the decision of the Hearing Officer to the Warden by filing a written request for review including his reasons for review with the Hearing Investigator within twenty-four hours, exclusive of weekends and holidays.
3. The clerk shall promptly transmit the request for review and the hearing records to the Warden.

4. The Warden or his designate shall act on the request within five (5) working days of his receipt by affirming the decision of the Hearing Officer (with reasons stated), reducing the severity of the sanctions imposed or vacating the judgement of the Hearing Officer. He may also increase the severity of the disposition imposed (with reasons stated).

5. Pending this decision from the Warden on his designate, the sanction shall be imposed on the inmate.

6. The inmate shall be notified in writing of the decision of the Warden.

7. If the inmate is not satisfied with the decision of the Warden, he may consider instituting appropriate litigation.

J. Class III Violation and Descriptions:

031	**Providing a False Statement:** Knowingly providing false information to an employee.	Giving a false name, number, or room/cell assignment. (Note that making false accusations of misconduct is included under the Class II violation – interference with due process, 022).
032	**Possession of Cash Under the Sum of $1.00:** Money is defined as either cash or negotiable instrument.	Any money under the sum of $1.00.
033	**Health, Safety, or Fire Hazard:** Creating a health, safety, or fire hazard by act or omission.	Dirty cell; lack of personal hygiene; smoking in an unauthorized area. Excessive accumulation of personal property.

034	**Contraband:** Possession or use of non-dangerous property which an inmate has no authorization to have and where there is no suspicion on theft.	Unauthorized items; anything with someone else's name or number on it; a TV or radio that is dismantled or otherwise altered.
035	**Destruction or Misuse of State Property with Value of Less than $5.00:** Any destruction, removal, alteration, tampering, or other misuse of state property which has a replacement value of less than $5.00.	
036	**Unauthorized Communication:** Any contact, by letter, gesture or verbally, with an unauthorized person or in an unauthorized manner.	Passing property on a visit either directly or through a third person. Communication with a visitor through any channel other than visiting room. Unauthorized use of telephone.
037	**Late for Schedule Work Assignment:**	Being late for work.
038	**Horseplay:** Any physical contact or attempted physical contact between two or more persons done in a prankish or playful manner, without anger or intent to injure or intimidate.	Towel-snapping at others, body punching, or attempted physical wrestling, grab-ass.
039	**Unauthorized Area:** Being present in an unauthorized area when such presence is not a threat to the institution.	The lesser charge of a major rule violation (017).

040	**Conduct With a Visitor:** Conduct with a visitor in violation of verbal or written orders.	Failure to follow visiting room rules where there is no threat to institution security.
041	**Violation of Posted Rules or Institution Policy:** Violation of posted rules in the housing unit or work area where there is no threat to institution security.	
042	**Loan Sharking:** Loaning of property or anything of value, for profit or increased return.	
043	**Transferring, Soliciting, or Accepting Money or Personal Property:** From another inmate, visitor or general public without authorization. With a value of less than $10.00.	Receiving or giving canteen to another inmate. Receiving property from a visitor. Accepting any item from the general public without authorization.

K. Disciplinary Report Procedure – Class III:

1. **Responsibility:** An employee who witnesses an apparent rule violation should first determine whether a warning or a summary action is appropriate. If such action is not sufficient, she/he should then check the list of misconduct violations to decide which is appropriate and write the misconduct report.

2. **Summary Action:** The reporting employee has an option of a summary action or a minor misconduct

report. If the reporting employee determines a summary action is sufficient, he/she may impose summary punishment not to exceed 24 hours' room lockup or eight hours extra dusty [sic] for minor misconduct – if the inmate signs a waiver of his right to a minor misconduct hearing. Non-dangerous contraband must be confiscated in conjunction with any of these summary punishments and turned over to appropriate institutional staff for proper disposition. A summary action slip, signed by the inmate, is needed to confiscate a TV, radio or any other personal property believed to be contraband (no shakedown slip is needed). A record of this action must be kept on file. If the inmate does not sign an offered summary action, the resultant rule infraction report shall be processed and heard as a "class III" – regardless of the charge, or the inmate's disciplinary record.

All Shift Supervisors and/or Unit Sergeants will be responsible for the proper handling and disposition of Class III violations reports.

3. **Procedure:** In the event a Class III report is written, the observing staff member will prepare and submit a misconduct report to his applicable supervisor. The report will include:

   a. The specific rule alleged to have been violated.

   b. The time and place of the incident.

   c. A description of the alleged violation.

   d. Names of the witnesses.

   All reports will be signed by the reporting staff member and submitted to the inmate's respective Housing Unit Sergeant or Unit Counselor.

4. After the report has been submitted, the Housing Unit Supervisor will:

   a. Screen the report to insure that all necessary information is included and that the report is complete and clearly defines that a minor misconduct violation has been committed.

   b. Ensure that all necessary evidence has been presented.

   c. Properly investigate the report, which will include discussing the report with the inmate so charged and informing him of the hearing date and time. A hearing will be held within ten (10) days with allowance for the twenty-four (24) hour notification period.

5. The hearing on a Class III will be in front of the Unit Counselor and Unit Sergeant. Agreement of these two on a finding of guilt is needed for a disposition. If the counselor and sergeant cannot agree on guilt, the finding is not guilty.

6. Disposition of minor misconduct will never be imposed without first holding a hearing with the inmate and informing him verbally of that decision and disposition.

7. The Unit Supervisor will ensure that the inmate signs the report.

8. **Sanctions:**

   a. Counseling, warning, or reprimanding the inmate(s) involved.

   b. Loss of any one or all recreation activities for a period of not more than five (5) consecutive days of scheduled activity.

   c. Restriction from the Commons/Hobby/Recreation area and/or Library for a period not to exceed five (5) consecutive days.

   d. Confinement to room, cell, or living area except for attendance at work, educational assignments, meals, visits for a period not to exceed five (5) consecutive days. The unit team may remove hobby or personally owned TV's, radios, and tape players during this confinement.

   e. Loss of phone privileges for a period not to exceed five scheduled calls, if there is a violation of the telephone policy.

   f. Pay restitution for damaged state property with a value of $5.00 or less.

   g. Termination of visiting privileges with specified individuals for a period not to exceed 30 consecutive days for first violation, 60 days for second violation and 90 days third violation, if there has been a violation of a visiting room regulation.

   h. Confiscate contraband items in violation of policy and where there is no suspicion of theft.

   i. Eight hours extra duty to be completed at the discretion of the Unit Sergeant.

9. **Appeals for Class III Impositions:** An inmate may appeal this decision to the Security Manager. In such cases, the inmate will be required to voice such intent to appeal to the Housing Unit Team at the time of the hearing. He will also be required to indicate this intent on the written infraction report before the signature is made. The appeal must be submitted within 24 hours.

If the inmate indicates on the report that he desires to appeal the decision of the Class III hearing, the respective Housing Unit Team members will forward the hearing report and the written appeal to the Security Manager. The Security Manager must respond to the appeal within five (5) working days. He may:

a. Affirm the decision of the Housing Unit Team.

b. Increase the severity of the action imposed by the Housing Unit Team.

c. Reduce the severity of the action imposed by the Housing Unit Team.

d. Vacate the judgment of the Housing Unit Team.

e. Reduce or change the charges to an appropriate Class III charge in line with the evidence present.

The sanction will be imposed pending appeal. There will be no other appeal of the Class III infraction. Class III reports will not be made a part of the permanent record. The Housing Unit Team may keep an informal record of Class III's for monitoring an inmate's progress in the unit.

APPROVED: /s/ Jack McCormick
JACK McCORMICK
WARDEN

DATE: 10/[Illegible]/89
JM/CKB/cmj

I _____ (Inmate Signature) MSP # _____ acknowledge by my signature here that I have received a copy of MSP 15-001, Inmate Disciplinary Policy on _____, 19___.

_____ (Staff Witness Signature)

MONTANA STATE PRISON
POLICY STATEMENT

TITLE: INMATE CORRESPONDENCE POLICY
NUMBER: MSP 16-001
EFFECTIVE DATE: February 11, 1985
REVISED: August, 1990
October, 1991
October, 1992
AUTHORITY: MSP 01-001, Organization and Responsibility DOI 506, Inmate Correspondence
OBJECTIVE: To establish regulations concerning inmate correspondence.
POLICY: Inmates shall be allowed to communicate and correspond with outside persons or organizations subject only to limitations necessary to maintain institutional order, security, and health. Correspondence between inmates and their families, friends, and other associates shall be encouraged.

I. PRIVILEGED CORRESPONDENCE

A. Privileged correspondence consists of mail from and to:

1. licensed attorneys;
2. state or federal court judges and their law clerks;
3. elected officials, state or federal;

4. Montana Defender Project, Montana Legal Services Association, State Bar of Montana, American Civil Liberties Union, Civil Rights Division and NAACP;
5. the Department of Corrections and Human Services Director, Deputy Director, Attorneys, Corrections Division Administrator, Deputy Administrator and the Community Services Bureau Chief;
6. bankruptcy court;
7. Department of Justice/Attorney General;
8. Medical Review Panel, and
9. Commission on the [sic] Practice of the Supreme Court.

B. Outgoing privileged correspondence:

1. shall indicate on the envelope the name and the official status of the addressee;
2. shall not be opened, inspected or censored in any manner, unless the conditions described in Section VI., A., of this policy exist, and
3. may be held for a reasonable period of time to allow verification of the addressee's status.

C. Incoming privileged correspondence:

1. shall indicate the name and official status of the sender on the envelope;
2. may be opened and examined for contraband only in the presence of the inmate addressee;
3. shall not be read by institution staff;
4. may be held for a reasonable period of time to allow for verification of the sender's status, and

5. from the Department Director, Deputy Director and Corrections Division Administrator shall be sealed with a unique seal and, providing that the seal is not broken, shall be delivered unopened to the addressee. If the seal has been tampered with, the letter will be forwarded directly to the Superintendent/Warden.

II. GENERAL CORRESPONDENCE

A. General correspondence consists of mail to and from persons not included in Section I., A., of this policy.

B. Outgoing general correspondence:

1. All outgoing mail may be stamped with the institution name and address.

2. Inmates shall be allowed to send letters to any person or organization, unless that person or organization has notified the institution that they object to receiving such mail.

3. Inmates shall be allowed to send as many letters as they wish, unless evidence related to institutional security, order or rehabilitation exists to justify a limit.

4. General population inmate mail shall not be opened, inspected or censored in any manner, unless the conditions described in Section VI, of this policy exist. Maximum Security mail will be sent from the unit unsealed and will be read.

5. Shall include the sender's name, number and complete return address.

6. Cassette tape correspondence is not allowed.

7. Inmates shall be allowed to send money only to those persons on that inmate's approved Correspondence/Visiting List.

C. Incoming general correspondence:

1. There shall be no limit on the amount of First Class mail an inmate is allowed to receive.

2. First Class mail:

a. may be opened and inspected for contraband;

b. must clearly state the inmate's name and identification number.

3. First Class mail may be read if:

a. it is from another correctional facility;

b. is being returned to the institution as undeliverable;

c. is addressed to Maximum Security or Administrative Segregation inmates, and/or

d. is believed to be in violation of this policy.

4. Incoming mail may also be read if there is reasonable suspicion to believe that the letter contains:

a. threats of physical harm against any person or threats of criminal activity;

b. blackmail or extortion;

c. contraband being sent in or out of the institution;

d. Plans to escape or assist another to escape;

e. Plans for activities in violation of institutional rules, such as riots;

f. Code or foreign language not understood by the reader;

g. Drugs or drug paraphernalia, and/or

h. Other material which would, if communicated, create a serious danger to the security of the institution.

5. If mail is read, the inmate will be notified and informed of the reason why and a written record shall be made consisting of:

a. the inmate's name and number;

b. sender's name and date of letter, and

c. the reason for reading the letter.

6. If any portion of a letter which is read contains any of the violations listed under Section II., C. 3-4, above, or contains any reference to a postal regulation violation, the letter may not be delivered and the inmate to whom it is addressed will be informed of the reasons for nondelivery and entitled to the provisions of Sections VI., of this policy.

7. Money received via first class mail must be in the form of a money order only. Money may be received from two sources only: immediate family members must purchase and send the money order, (i.e., mother, father, brother, sister, wife, children and/or ex-wife (only if they have custody of minor children), grandparents and step-parents if the inmate has spent the majority of his life with them); and approved business transactions, (for example, hobby craft purchases). Cash, personal checks or

money received in any other way, unless pre-approved by the appropriate Security Manager, will not be deliverable and will be processed as per Section VI, of this policy.

III. PACKAGES (Incoming)

A. Packages may be received from persons on the inmate's approved visiting list containing only the items pre-approved by the administration of the institution.

B. Contents of the package must be new and unused, and in the case of items on which the institution sets monetary value limits, the price tag or other evidence of value must be affixed.

C. Any item received, which would cause an inmate to exceed the personal possession limitation (see D. below) imposed by the institution, or any item whose value is in excess of the monetary value limit established by the institution for that item, will be considered undeliverable and processed as per Section VI., of this policy.

D. The following is a list of items pre-approved by the administration of the institution for an inmate to receive from persons on the inmate's approved visiting list: (This is also the maximum quantity that the inmate can have in his possession at any one time.)

1. *White* cotton briefs and *white* cotton undershirts. Pockets are okay. No nylon. No knit. No slogans. No logo/emblem (six of each).

2. Socks (six pairs only).

3. No boots or shoes unless they come directly from a retail or wholesale outlet. Inmates are

allowed two pair of shoes, can be a combination, i.e., one pair boots or shoes and one pair tennis shoes or two pair tennis shoes or two pair boots or shoes.

4. House slippers (one pair only).

5. Regular *cotton* sweatshirts and sweatpants (two of each). No hooded types; no dark blue or black or mixture of these two colors. No nylon type. (Small arm and leg stripes or manufacturer's logo/emblem, zippers and pockets are approved.)

6. Athletic type gym trunks (two pair only). No spandex, swimming suits or street shorts. (Leg stripe and/or manufacturer's logo/emblem and pockets are approved.)

7. Gloves (two pair only).

8. White, paisley blue or paisley red handkerchiefs (12 only).

9. Knit stocking cap, baseball hat (dark blue – one each). No emblems or logos.

*10. Prescription glasses, sunglasses (Maximum Security inmates can not have sunglasses) and contact lenses (one pair each). Saline solution and daily cleaner for contacts only.

11. Small religious medallions, (limit of two) (Maximum Security – limit one) valued under $75. (No necklaces or earrings.)

*12. Rings valued under $75 (two only). (Maximum Security inmates can only have one wedding ring.)

*13. Wrist, pocket or pen watches, valued under $75 (one only).

*14. New electric razor or beard trimmer (one only). *No battery operated.*

15. Waist trimmer and weight lifting belt (one each). Wrap around only.

16. Thermal underwear in solid white or gray (three pair only). *No other colors.*

17. Bath towels, hand towels, and wash cloths (two each). No beach towels.

18. Calculators, hand held only, no print-out (one only). Value of no more than $25.

19. Cribbage board, dominoes, checkers, chess set, scrabble and puzzle (one each). Value of no more than $25. Must be in sealed package. No electronic games.

20. Dark blue vest (one only) *for low security inmates only.*

* Only items allowable for inmates in the Maximum Security Unit.

E. Limits on incoming packages per month.

1. Maximum Security Compound – One package only from anyone on the approved Correspondence/Visiting List. This is not one package per person, but rather only one package per month from whomever.

2. High Security Compound – Two packages only per month from any one or more persons on the approved Correspondence/Visiting List.

3. Low Security Compound – Three packages only per month from any one or more persons on the approved Correspondence/Visiting List.

IV. PACKAGES (Outgoing)

A. Inmates can ship packages (at inmate's expense) only to persons on their approved Correspondence/Visiting List.

B. Inmates' visitors are allowed to pick up personal property after being approved by the Property Officer.

V. PUBLICATIONS

A. Inmates may receive books, magazines, newspapers or other printed matter, providing such material is sent directly by the publisher or an authorized retail outlet, and providing such material:

1. does not contain instructions for the manufacturing of explosives, weapons, drugs or drug paraphernalia;
2. does not advocate violence and is not of a type that has caused violence or disruption in similar institutions;
3. does not advocate racial, religious or national supremacy or hatred;
4. does not encourage behavior which is detrimental to rehabilitation such as gambling, illegal sexual activities or encouraging the commission of a crime;
5. does not violate any other existing institutional policy, and
6. is not the result of a contract purchase (no book clubs).

B. Inmates may receive advertising flyers, pamphlets, catalogs, promotional material and other bulk rate mail providing such material:

1. is addressed to one particular inmate;
2. meets all the conditions as outlined under Section IV., A., above.

C. A publication or bulk rate mail believed to be in violation of the policy, shall be processed as per Section VI, of this policy.

VI. TAPES

A. Inmates cannot send out taped correspondence without prior approval from the Deputy Warden.

B. Inmates may receive cassette tapes only from approved vendors and/or Canteen. Video tapes are not acceptable. (Inmates may have in their possession a maximum of 24 tapes.)

C. Cassette tapes may be received from a retail or wholesale outlet only. Individuals on an inmate's visiting correspondence list cannot send cassette tapes or order cassette tapes for an inmate.

VII. GENERAL CONDITIONS AND SPECIAL PROVISIONS

A. Incoming and outgoing mail may be opened, inspected and held if there are reasonable grounds to believe that the mail is being sent contrary to this policy by an inmate or a person outside of the institution.

B. When an inmate's mail is opened, inspected and held, the inmate will be notified and informed of the reason why and a written record shall be made consisting of:

1. the inmate's name and number;

2. sender's name and date of letter, and

3. the reason the mail was inspected and held.

C. If the mail is found to be in violation of this policy it will be considered undeliverable and processed as per Section VI., of this policy.

D. Indigent inmates will be provided necessary correspondence material, including stamps, as per the institution's Indigent Policy (MSP 12-002).

E. Air, certified, registered, over-sized and overweight mail services will be available providing the inmate pays for such services as per institutional procedure.

F. Nude photographs of persons who appear to be under the age of 16 may be held until proof of age is obtained.

VIII. DUE PROCESS

A. Contents of First class mail, publications, bulk rate mail, other printed material or package items believed to be in violation of this policy, shall be forwarded to the appropriate Security Manager for final decision. If that decision determines that the item in question is in violation of this policy, the material shall be held as evidence until the inmate is given an opportunity to request a hearing. If the inmate requests the hearing and the hearing upholds the decision of the Security Manager, the material held as evidence shall be disposed of in the following manner:

1. Returned to the sender at the inmate's expense, or;

2. Destroyed in the presence of two staff members, or;

3. Sent to a third party of the inmate's choosing at the inmate's expense, or

4. Donated to a charitable organization at the inmate's expense.

B. The inmate may appeal the decision of the hearing by notifying the Hearing Officer of his intent to appeal at the time of the hearing and by filing a written request for review to the Warden's Office within a period of (24) twenty-four hours, exclusive of weekends and holidays.

C. Undeliverable mail will not be stored at the institution, but may be retained as evidence until a hearing and possible appeal is concluded.

APPROVED:

/s/ Jack McCormick
JACK McCORMICK, WARDEN

DATED:

10/7/91

JM/BW/cj
10-7-91

MSP 16-001
Attachment #1

MONTANA STATE PRISON
MAIL REGULATIONS
(Revised 10-13-92)

I. INCOMING MAIL:

All incoming mail for inmates must be identified clearly with the name and prisoner identification number. There is no limit on the amount of incoming

first-class mail a prisoner may receive. All incoming mail shall be opened and inspected for money or contraband. Mail from other correctional facilities and mail to prisoners in Maximum Security and Administrative Segregation may be read.

II. **MONEY ORDERS:**
Money received via first-class mail must be in the form of a money order. *Cash* or *personal checks* are *not* deliverable. Inmates may receive money *only* from immediate family members or persons approved by the Superintendent/Warden, or his designee.

III. **PHOTOS:**
No photos with backing material. Nude photos of persons who appear to be under the age of 16 may be held until proof of age is obtained.

IV. **PACKAGES:**
Packages may be received from persons on the inmate's *approved visiting list* containing only the items *pre-approved by the administration of the institution.*

Contents of the package must be *new* and *unused,* and in the case of items on which the institution sets monetary value limits, the *price tag* or other evidence of value must be *affixed.*

The following is the list of items pre-approved by the administration of the institution an inmate is allowed to receive in a package from an approved visitor. Since the quantities listed are also the maximum quantities that the inmate can have in his possession at any one time, it is strongly recommended that the inmate be contacted prior to sending any package to determine if he is already at the maximum quantity limit. An inmate will not be allowed to receive any item that exceeds the maximum quantity limit.

1. *White* cotton briefs and *white* cotton undershirts. Pockets are okay. No nylon. No knit. No slogans. No logo/emblem (six of each).
2. Socks (six pairs only).
3. No boots or shoes unless they come directly from a retail or wholesale outlet. Inmates are allowed two pair of shoes, can be a combination, i.e., one pair boots or shoes and one pair tennis shoes or two pair tennis shoes or two pair boots or shoes.
4. House slippers (one pair only).
5. Regular *cotton* sweatshorts and sweatpants (two of each). No hooded types; no dark blue or black or mixture of these two colors. No nylon type. (Small arm and leg stripes or manufacturer's logo/emblem, zippers and pockets are approved.)
6. Athletic type gym trunks (two pair only). No spandex, swimming suits or street shorts. (Leg stripe and/or manufacturer's logo/emblem and pockets are approved.)
7. Gloves (two pair only).
8. White, paisley blue or paisley red handkerchiefs (12 only).
9. Knit stocking cap, baseball hat (dark blue – one each). No emblems or logos.

*10. Prescription glasses, sunglasses (Maximum Security inmates can not have sunglasses) and contact lenses (one pair each). Saline solution and daily cleaner for contacts only.

*11. Small religious medallions, (limit of two) (Maximum Security – limit on one) valued under $75. (No necklaces or earrings.)

*12. Rings valued under $75 (two only). (Maximum Security inmates can only have one wedding ring.)

*13. Wrist, pocket or pen watches, valued under $75 (one only).

*14. New electric razor or beard trimmer (one only). *No battery operated.*

15. Waist trimmer and weight lifting belt (one each). Wrap around only.

16. Thermal underwear in solid white or gray (three pair only). *No other colors.*

17. Bath towels, hand towels, and wash cloths (two each). No beach towels.

18. Calculators, hand held only not print-out (one only). Value of no more than $25.

19. Cribbage board, dominoes, checkers, chess set, scrabble and puzzle (one each). Value of no more than $25. Must be in sealed package. No electronic games.

20. Dark blue vest (one only) *for low security inmates only.*

* Only items allowable for inmates in the Maximum Security Unit.

D. **TAPES**

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B. Inmates may receive cassette tapes only from approved vendors and/or Canteen. Video tapes are not acceptable. (Inmates may have in their possession a maximum of 24 tapes.)

C. Tapes may be received from a retail or wholesale outlet only. Individuals on an inmate's visiting correspondence list cannot send cassette tapes or order cassette tapes for an inmate.

E. **PUBLICATIONS**

1. Inmates may receive books, magazines, newspapers or other printed matter, providing such material is sent directly by the publisher or an authorized retail outlet, and providing such material:

   a. Does not contain instructions for the manufacturing of explosives, weapons, drugs or drug paraphernalia.

   b. Does not advocate violence and is not of a type that has caused violence or disruption in similar institutions.

   c. Does not advocate racial, religious or national supremacy or hatred.

   d. Does not encourage behavior which is detrimental to rehabilitation such as gambling, illegal sexual activities or encouraging the commission of a crime.

   e. Does not violate any other existing institutional policy.

   f. Is not the result of a contract purchase (*no book clubs*).

Including anything in a prisoner's mail that is not pre-approved or authorized in these regulations will result in mail being held up and in some cases may result in costly postage expenses.

February 16, 1995

Dear Pat:

How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got eveything taken care of. I can't come up to max anymore. the lowside clerks go up there now. that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I recieved two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another poiont is that he grabbed you from behind. You tell your lawyer to get ahold of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.

Later. . . .

Murph

om Inmate Kevin Murphy
Legal Clerk

To: Pat Tracy
Max
Insti. Mail

MAJOR MISCONDUCT VIOLATION REPORT – CLASS II
INMATE NAME: Murphy, K. MSP# 12810

DATE: 2-17-95 TIME: 0745 PLACE OF INCIDENT: CV-II – Supervisors Office

ROOM OR CELL: LA-4 yrs HOUSING UNIT: CV-II ASSIGNMENT: Law Clerk #404

VIOLATION OF INMATE RULES AND REGULATIONS: #009-[illegible] – (Displaying any material of an offensive nature that makes reference to an employee of the D.O.C. – Abusive language, writing or obscene gestures.)

STAFF WITNESSES: 1. _____

2. _____

OTHER INMATES 1. _____

INVOLVED 2. _____

DESCRIPTION OF ALLEGED VIOLATION(S): While routinely monitoring institutional mail I (C.S. SHAW) noticed comments in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an over zealous guard who punishes and harasses Inmates for a personal pleasure. Inmate Murphy also accused CO Galle of making homo-sexual advances towards Inmates. Inmate Murphy stated that CO Galle retaliated against Inmate Murphy by writing him up on two rule infractions. End of Report!

Copy of letter attached!

C.S. R. Shaw
REPORTING STAFF
MEMBER'S SIGNATURE

DISPOSITION OF INMATE:

( ) MANDATORY TEMPORARY LOCK-UP

(✓) RELEASE TO PREVIOUS STATUS

( ) OTHER _____

REASON: _____

DATE: 2-17-95 TIME: 1530 CELL SECURED ( ) YES

(✓) NO NOTIFIED: _____

INVESTIGATOR ASSIGNED BY

SHIFT LT. ( ) YES (✓) NO

[Illegible]
SHIFT LT.'S SIGNATURE

I HAVE RECEIVED A COPY OF THIS NOTICE AND HAVE BEEN INFORMED OF MY RIGHTS TO:

1. HAVE A HEARING (DATE) 3-2-95 TIME 0800-1500 PLACE High Support.
2. BE PRESENT AT THE HEARING AND PRESENT EVIDENCE ON MY OWN BEHALF

I UNDERSTAND, IF FOUND GUILTY, I WILL BE SUBJECT TO IMPOSITION OF THE SANCTIONS AS OUTLINED IN THE INMATE DISCIPLINARY POLICY.

[Illegible] _____ /s/ L. Ken Murhpy _____
WITNESS INMATE'S SIGNATURE/ MSP#

cc: 1. Records Office
2. Parole Board
3. Unit Counselor
4. Inmate

_____

MAJOR MISCONDUCT VIOLATION REPORT – CLASS II

INMATE NAME: Murphy, K. MSP# 12810

DATE: 2-17-95 TIME: 0745 PLACE OF INCIDENT: CV-II – Supervisors Office

ROOM OR CELL: LA-4 HOUSING UNIT: CV-II ASSIGNMENT: Law Clerk #404

VIOLATION OF INMATE RULES AND REGULATIONS: #022-Interference with Due Process Hearings: – Intimidating or tampering with an informant or Witness; making a false statement of misconduct against staff which would result in disciplinary action.

STAFF WITNESS: 1. _____

2. _____

OTHER INMATES 1. _____

INVOLVED 2. _____

DESCRIPTION OF ALLEGED VIOLATION(S): While routinely monitoring institutional mail I (C.S. SHAW) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter, Inmate Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Jnmate Murphy states he tried to "do something" about CO Galle but He (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact. End of Report!

See Copy of letter which is attached!

C.S. R. Shaw
REPORTING STAFF
MEMBER'S SIGNATURE

DISPOSITION OF INMATE:

( ) MANDATORY TEMPORARY LOCK-UP

(✓) RELEASE TO PREVIOUS STATUS

( ) OTHER _____

REASON: _____

DATE: 2-17-95 TIME: 1530 CELL SECURED ( ) YES (✓) NO NOTIFIED: _____

INVESTIGATOR ASSIGNED BY

SHIFT LT. ( ) YES (✓) NO

[Illegible]
SHIFT LT.'S SIGNATURE

I HAVE RECEIVED A COPY OF THIS NOTICE AND HAVE BEEN INFORMED OF MY RIGHTS TO:

1. HAVE A HEARING (DATE) 3-2-95 TIME 0800-1500 PLACE High Support.

2. BE PRESENT AT THE HEARING AND PRESENT EVIDENCE ON MY OWN BEHALF

I UNDERSTAND, IF FOUND GUILTY, I WILL BE SUBJECT TO IMPOSITION OF THE SANCTIONS AS OUTLINED IN THE INMATE DISCIPLINARY POLICY.

[Illegible]
WITNESS

/s/ L. Kevin Murhpy
INMATE'S SIGNATURE/
MSP#

cc: 1. Records Office
2. Parole Board
3. Unit Counselor
4. Inmate

MAJOR MISCONDUCT VIOLATION REPORT – CLASS II
INMATE NAME: Murphy, K. MSP# 12810

DATE: 2-17-95 TIME: 0745 PLACE OF INCIDENT: CV-II – Supervisors Office

ROOM OR CELL: LA-4 HOUSING UNIT: CV-II ASSIGNMENT: Law Clerk #404

VIOLATION OF INMATE RULES AND REGULATIONS: #025 Conduct which disrupts with the orderly operation of the institution – knowingly interfering with intent to disrupt an employee performing any routine security procedure.

STAFF WITNESSES: 1. _____
2. _____

OTHER INMATES 1. _____
INVOLVED 2. _____

DESCRIPTION OF ALLEGED VIOLATION(S): While routinely monitoring institutional mail I (CS Shaw) noticed comments made by Inmate Murphy to Inmate Tracy. These comments are intended to persuade Inmate Tracy to perform certain actions to make a situation that Murphy is involved in look better. Inmate Murphy also stated "We must pursue this out of the Prison system." Inmate Murphy also stated "Well I will write again when I have this thing against Galle finished." Both statements are threatening. End of Report!

See attached letter.

C.S. R. Shaw
REPORTING STAFF
MEMBER'S SIGNATURE

DISPOSITION OF INMATE:

( ) MANDATORY TEMPORARY LOCK-UP

(✓) RELEASE TO PREVIOUS STATUS

( ) OTHER _____

REASON: _____

DATE: 2-17-95 TIME: 1530 CELL SECURED ( ) YES (✓) NO NOTIFIED: _____

INVESTIGATOR ASSIGNED BY

SHIFT LT. ( ) YES (✓) NO

[Illegible]
SHIFT LT.'S SIGNATURE

I HAVE RECEIVED A COPY OF THIS NOTICE AND HAVE BEEN INFORMED OF MY RIGHTS TO:

1. HAVE A HEARING (DATE) 3-2-95 TIME 0800-1500 PLACE High Support.
2. BE PRESENT AT THE HEARING AND PRESENT EVIDENCE ON MY OWN BEHALF

I UNDERSTAND, IF FOUND GUILTY, I WILL BE SUBJECT TO IMPOSITION OF THE SANCTIONS AS OUTLINED IN THE INMATE DISCIPLINARY POLICY.

_____ _____
WITNESS INMATE'S SIGNATURE/ MSP#

cc: 1. Records Office
2. Parole Board
3. Unit Counselor
4. Inmate

MONTANA STATE PRISON
DISCIPLINARY HEARING DECISION

DATE: 3/2/ 1995

INMATE'S NAME: Murphy Kevin AO# 12810

REPORTED VIOLATION(S): 009

✓ I DO UNDERSTAND/ _____ I DO NOT UNDERSTAND THE VIOLATION. CONTINUANCE GRANTED TO DATE: _/_/ 19_ BY: _____

REASON: _____

PLEA:
( ) GUILTY (✓) NOT GUILTY

( ) OTHER: _____

INMATE'S STATEMENT: Murphy requested an extention of time to obtain further information. Request denied Murphy has had 8 days from service to marshall his defense.

All I was doing is assisting a inmate with legal advice.

FINDINGS: (✓) GUILTY 009

( ) NOT GUILTY _____

EVIDENCE USED: Per policy wards, actions, gestures intended to harass or cause alarm. Class II infraction report, inmate statement.

SANCTIONS: 5 days detention suspended for 90 days pending clear conduct concurrent with 022 of the same date.

REASON(S): evidence states c/o Galle retaliated against inmate Murphy by issuing him Murphy a class II infraction, that statement indicates unprofessional actions which stand to intimidate the employee.

/s/ L.E. Bearley
HEARING OFFICER'S
SIGNATURE

I UNDERSTAND I MAY APPEAL THE ABOVE DECISION BY FILING A WRITTEN REQUEST FOR REVIEW AND MY REASON THEREFORE WITH THE BUREAU WARDEN WITHIN TWENTY FOUR (24) HOURS.

XK.M.,XU I DO - INTEND TO APPEAL.

_____ I DO NOT INTEND TO APPEAL.

X /s/ Kevin Murphy
INMATE'S SIGNATURE/
MSP#

cc: 1. Records Office
2. Parole Board
3. Unit Counselor
4. Inmate

MONTANA STATE PRISON
DISCIPLINARY HEARING DECISION

DATE: 3/2/ 1995

INMATE'S NAME: Murphy Kevin AO# 12810

REPORTED VIOLATION(S): 022

✓ I DO UNDERSTAND/ _____ I DO NOT UNDERSTAND THE VIOLATION. CONTINUANCE GRANTED TO DATE: _/_/ 19_ BY: _____

REASON: _____

PLEA:
( ) GUILTY (✓) NOT GUILTY

( ) OTHER: _____

INMATE'S STATEMENT: I sincerely believe I was doing something within the limits of my job discription. I believe these should not have been written by C.S. Shaw. I don't believe there is any limitations on when I help. I must help everyone. My motive was to help Tracy in his litigations.

FINDINGS: (✓) GUILTY 022

( ) NOT GUILTY_____

EVIDENCE USED: Class II infraction report inmates statement physical evidence (letter written to Pat Tracy by [Illegible] inmate Murphy.

SANCTIONS: 5 days detention suspended for a period of 90 days pending clear conduct.

REASON(S): The statement referring to c/o Galle making homo sexual advances to another inmate would result in disciplinary action against stated employee of the D.O.C..

/s/ L.E. Bearley
HEARING OFFICER'S
SIGNATURE

I UNDERSTAND I MAY APPEAL THE ABOVE DECISION BY FILING A WRITTEN REQUEST FOR REVIEW AND MY REASON THEREFORE WITH THE BUREAU WARDEN WITHIN TWENTY FOUR (24) HOURS.

XK.M. I DO INTEND TO APPEAL.

_____ I DO NOT INTEND TO APPEAL.

X /s/ Kevin Murphy
INMATE'S SIGNATURE/
MSP#

cc: 1. Records Office
2. Parole Board
3. Unit Counselor
4. Inmate

JEFFREY T. RENZ, Director
DAVID PECK, Legal Intern
Montana Defender Project
School of Law
University of Montana
Missoula, MT 59812
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
(HELENA DIVISION)

KEVIN MURPHY individually and on behalf of other persons similarly situated, Plaintiffs, -v- ROBERT SHAW, Unit Sergeant, LARRY BEARLEY, Hearings Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RICHARD DAY, Department of Corrections Director Defendants.	)	No. CV 95-62-H-CCL CLASS ACTION COMPLAINT For Declaratory and Injunctive Relief (Filed Oct. 24, 1995)

INTRODUCTORY STATEMENT

1. This is an action for injunctive relief pursuant to 42 U.S.C. § 1983 for redress for actions taken against Plaintiff for his work as an inmate law clerk.

JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1343 (3) because plaintiffs' claims for relief are brought pursuant to 42 U.S.C. §1983.

PARTIES

3. Plaintiff Kevin Murphy was an inmate law clerk at the Montana State Prison trained by the Montana Defender Project to assist inmates with legal matters.

4. Defendants are individual employees of the Montana Department of Corrections and are named in their official capacities.

5. Defendant, Robert Shaw, is a unit sergeant at the Montana State Prison. Defendant Shaw was the shift supervisor on duty in Closed Unit II on February 17, 1995.

6. Defendant, Larry Bearley, is a hearings officer at the Prison responsible for determining whether alleged inmate misconduct violations have occurred.

7. Defendants, Michal Mahoney and Myron Beeson, are bureau wardens at the prison responsible for the establishment and enforcement of prison policies.

8. Defendant, Richard Day, is the director of the Department of Corrections, responsible for the overall policy development and management direction of the Prison.

9. All of Defendants' actions described below were taken under color of state law, custom, or practice.

CLASS ACTION

10. Plaintiff brings this action on his own behalf, as an inmate law clerk, and on behalf of other inmate law clerks both present and future.

11. Plaintiff also brings this action on his behalf, as an inmate, subject to the disciplinary policies of the Department of Corrections, and on behalf of other inmates, both present and future.

12. The nature of this action satisfies all of the requirements of Rule 23(a), (b) (1), (2), and (3) of the Federal Rules of Civil Procedure and should be maintained as a class action.

FACTS

13. On February 16, 1995, Plaintiff, acting as an inmate law clerk, wrote a letter to another inmate, Pat Tracy, in maximum security giving him advice and assistance regarding charges pending against him. Mr. Tracy was accused of assaulting a staff member, Officer Galle, in Close Unit I. A copy of this letter is attached as "Exhibit 1."

14. As a result of this letter, Defendant Shaw gave Plaintiff a Major Misconduct Violation Report (or "Class II.") Shaw alleged that Murphy violated Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings); and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution.) Copies of these disciplinary violations are attached as "Exhibit 2."

15. Defendant Larry Bearley found Plaintiff guilty of violating Rule 009 and Rule 022. Bearley sanctioned Plaintiff to ten days suspended detention and three reclassification points. Copies of the Disciplinary Hearing Decisisons [sic] are attached as "Exhibit 3."

16. Defendant Mahoney denied Plaintiff's appeal of the disciplinary violations.

FIRST CLAIM FOR RELIEF

17. Based upon the facts alleged above, Defendants' practice of disciplining inmate law clerks for the content of their communications with other inmates deprived plaintiff of his rights secured by the First Amendment to the United States Constitution, specifically his right to free speech, and his right to provide legal assistance to other inmates free of punishment and intimidation, for which he is entitled to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

SECOND CLAIM FOR RELIEF

18. Based upon the foregoing, Defendants' actions abridge the rights of inmates to access the courts by denying them the assistance of an inmate law clerk, for which Plaintiff is entitled to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

THIRD CLAIM FOR RELIEF

19. Defendants' actions abridge the rights of inmates to seek a Writ of Habeas Corpus pursuant to 28

U.S.C. 2254, for which Plaintiff is entilted [sic] to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

FOURTH CLAIM FOR RELIEF

20. Based upon the foregoing, Defendants' enforcement of Rule 009 deprived Plaintiff of his right to due process, and his right to free speech, guaranteed by the First and Fourteenth Amendments to the United States Constitution, for which he is entitled to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

FIFTH CLAIM FOR RELIEF

21. Based upon the foregoing, Defendants' enforcement and application of Rule 022 deprived Plaintiff of his right to due process and his right to free speech guaranteed by the Fourteenth Amendment to the United States Constitution, for which he is entitled to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

PRAYER FOR RELIEF

Plaintiffs respectfully pray that this honorable court:

1. Declare that Rule 009 is both vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Declare that Rule 022 is both vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution.

3. Declare that the Defendants' practice of disciplining inmate law clerks based on the content of their advice

to other inmates violates the clerks' and inmates' rights pursuant to the First Amendment and 28 U.S.C. § 2254.

4. Issue preliminary and permanent injunctive relief enjoining defendants from:

a) Enforcing Rule 009;

b) Enforcing Rule 022; and

c) Disciplining inmate law clerks for communications with inmate clients.

5. Grant any additional or alternative relief which the Court deems just and equitable under the circumstances.

6. Award plaintiff his attorneys' fees and costs.

DATED: June 21, 1995

/s/ David Peck
DAVID PECK
Legal Intern
Montana Defender Project
Counsel for Mr. Murphy

/s/ Jeffrey T. Renz
JEFFREY T. RENZ
Director
Montana Defender Project
Counsel for Mr. Murphy

[Exhibits omitted.]

DAVID L. OHLER
LOIS ADAMS; DIANA LEIBINGER
Attorneys at Law
Department of Corrections
1539 11th Avenue
Helena, Montana 59620
(406) 444-5682
ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of other persons similarly situated, Plaintiffs, vs. ROBERT SHAW, Unit Sergeant, LARRY BEARLEY, Hearings Officer, MICHAEL MAHONEY, Defendants.	Cause No. CV 95-62-H-CCL **ANSWER AND DEMAND FOR JURY TRIAL**

The Defendants answer the complaint as follows:

1. This paragraph states a legal conclusion, to which no response is necessary. To the extent that there are allegations of fact, they are denied.

2. This paragraph states a legal conclusion, to which no response is necessary. To the extent that there are allegations of fact, they are denied.

3. Admit.

4. Defendants admit that they are or were employees of the Montana Department of Corrections. The remainder of the paragraph states a legal conclusion, to which no response is necessary. To the extent that there are allegations of fact, they are denied.

5. Deny.

6. Deny. Defendants affirmatively allege that Mr. Bearley was previously employed as a Disciplinary Hearings Officer at Montana State Prison, and is currently employed as a Probation and Parole Officer with the Montana Department of Corrections.

7. Deny. Defendants affirmatively allege that Mr. Mahoney and Mr. Beeson were previously Bureau Wardens at Montana State Prison. Defendants further affirmatively allege that Mr. Mahoney is currently the Warden at Montana State Prison, and Mr. Beeson is currently a Deputy Warden at Montana State Prison.

8. Admit.

9. This paragraph states a legal conclusion, to which no response is necessary. To the extent that there are allegations of fact, they are denied.

10. Defendants are without sufficient information to form a belief as to the truthfulness of the allegations, and therefore they are denied.

11. Defendants are without sufficient information to form a belief as to the truthfulness of the allegations, and therefore they are denied.

12. This paragraph states a legal conclusion, to which no response is necessary. To the extent that there are allegations of fact, they are denied.

13. Defendants are without sufficient information to form a belief as to the truthfulness of the allegations, and therefore they are denied.

14. Defendants are without sufficient information to form a belief as to the truthfulness of the allegation in the first sentence, and therefore is denied. Mr. Shaw admits the second sentence. Mr. Shaw admits that the single document marked as Exhibit 2 and attached to the complaint is a copy of the Major Misconduct Report which he prepared on 2/17/95. Defendants deny the remainder of the allegations.

15. Mr. Bearley admits the first sentence. Mr. Bearley admits that he sanctioned the Plaintiff to ten days detention which was suspended. Mr. Bearley denies that he sanctioned Plaintiff to three reclassification points. Mr. Bearley admits that single document marked as Exhibit 3 and attached to the complaint is a copy of the Disciplinary Hearing Decision which he completed on 3/2/95. Defendants deny the remainder of the allegations.

16. Admit.

17. Deny.

18. Deny.

19. Deny.

20. Deny.

21. Deny.

22. Defendants deny any allegations contained in the complaint which are not specifically admitted in their answer.

FIRST DEFENSE

The Complaint fails to state a claim for which relief may be granted.

SECOND DEFENSE

The Defendants are state employees who are being sued for certain actions taken within the course and scope of their employment and are immune from liability pursuant to § 2-9-305, MCA.

THIRD DEFENSE

The Defendants did not personally participate in the actions complained of. The doctrine of *respondeat superior* does not apply in Section 1983 actions. *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

FOURTH DEFENSE

The Defendants are entitled to qualified immunity from suit because they acted in good faith.

FIFTH DEFENSE

The Plaintiff's claims of injury and damages, if any, were caused or contributed to by his own actions or the

acts of third parties which bars him from seeking relief from Defendants.

SIXTH DEFENSE

The Defendants are immune from any award to Plaintiff representing punitive damages pursuant to § 2-9-105, MCA.

SEVENTH DEFENSE

The Plaintiff failed to mitigate his damages, if any.

EIGHTH DEFENSE

Defendant Bearley is entitled to absolute immunity.

NINTH DEFENSE

The Plaintiff does not have standing.

TENTH DEFENSE

The complaint is not properly plead [sic] as a class action.

APPLICABILITY OF AFFIRMATIVE DEFENSES

At this time, Defendants are not certain as to what affirmative defenses may apply if this case proceeds to trial. Defendants expressly reserve the right to plead other affirmative defenses as discovery of the case progresses. Further, Defendants will dismiss any affirmative

defense at the pretrial conference which does not appear to be reasonably supported by the facts and/or the law.

WHEREFORE, the Defendants pray that:

1. Judgment be entered in their favor;
2. Plaintiff's complaint be dismissed with prejudice;
3. Plaintiff take nothing against the Defendants, and
4. The Court award the Defendants their costs and attorney's fees.

DEMAND FOR JURY TRIAL

Defendants demand a trial by jury on all issues which are triable by a jury. DATED this 13th day of March, 1996.

/s/ David L. Ohler
DAVID L. OHLER
Attorney for Defendants

[Certificate Of Service Omitted.]

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University of Montana
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(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of all other persons similarly situtated,	)	No. CV 95-62-H-CCL
Plaintiffs,	)	STATEMENT OF UNCONTROVERTED FACTS
-v-	)	
ROBERT SHAW, et al.,	)	
Defendants.	)	

Plaintiff Kevin Murphy respectfully submits the following statement of uncontroverted facts:

1. On February 16, 1995, Plaintiff Kevin Murphy was acting as an inmate law clerk. (Murphy affidavit ¶ 2).

2. On February 16, 1995, Murphy wrote a letter to inmate Pat Tracy giving him advice regarding disciplinary charges pending against him. (Murphy affidavit ¶ 3); Exhibit 1; Response to Request for Admission No. 4).

3. Tracy had asked for Murphy's assistance about two weeks earlier. (Murphy affidavit ¶ 3).

4. Defendant Robert Shaw was a shift supervisor at Montana State Prison on February 17, 1995. (Response to Request for Admission No. 1).

5. On February 17, 1995, Shaw gave Murphy a Major Misconduct Violation Report for writing the letter to Tracy. (Response to Request for Admission Nos. 5, 6, 7, 8; Exhibits 4).

6. Murphy was referred to Hearing Officer Larry Bearley, who found Murphy guilty of violating prison Rules 009 (Insolence) and 022 (Interference with due process hearings). (Response to Request for Admission No. 9).

7. Bearley sentenced Murphy to five days detention, execution of which was suspended for a period of 90 days. (Exhibit 2; Murphy affidavit ¶ 6).

8. Murphy appealed to Warden Mike Mahoney, who denied the appeal. (Exhibit 3; Murphy affidavit ¶ 7).

9. Defendant Rick Day is the Director of the Department of Corrections. In that capacity Day is responsible for overall policy development, management, direction, and administration of the Department. Admin. R. Mont. § 20.1.101(1) (d).

DATED: May 31, 1996

/s/ Jeffrey T. Renz
JEFFREY T. RENZ, one of
Plaintiff's Attorneys.

[Exhibits and Certificate Of Service Omitted.]

JEFFREY T. RENZ
DAVID C. PECK, Legal Intern
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Missoula, Montana 59812
(406) 243-4823
Attorneys For Plaintiff

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA
(HELENA DIVISION)

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, Unit Sergeant, LARRY BEARELY, Hearings officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RICHARD DAY, Department of Corrections Director Defendants.	*	No. CV 95-62-H-CCL AFFIDAVIT OF KEVIN MURPHY

STATE OF MONTANA)
: ss
County of Powell)

I, KEVIN MURPHY, being first duly sworn state:

1. I am an inmate confined at Montana State Prison, Dear Lodge, Montana.

2. On or about February 16, 1995, I was working as an inmate law clerk while confined at Montana State Prison. A copy of my work assignment is attached hereto as Exhibit 1.

3. On or about February 1, 1995, A fellow inmate, Pat Tracy, had requested my assistance, through another inmate, on charges pending against him for assaulting a prison officer. At this time Pat Tracy was housed in the Maximum Security wing and I was unable to see him personally. On or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges pending against him. The letter attached to plaintiff's complaint as "Exhibit 1" is a true and accurate copy of this letter.

4. On or about February 17, 1995, Unit Sergeant Robert Shaw read the above mentioned letter.

5. As a result of the letter, defendant Shaw gave me three Major Misconduct Violation Reports or ("Class IIs"). In these Class IIs defendant Shaw alleged that based on the content of the letter, I violated Rules 009, 022 and 025. The Major Misconduct Violation Reports attached to plaintiff's complaint as "exhibit 2" are true and accurate copies of those Class IIs.

6. Hearings officer Larry Bearley found me guilty of violating Rules 009 and 022 and sanctioned me to ten days suspended detention. As a result I also received three reclassification points.

7. Bureau Warden Mike Mahoney denied my appeal of the above mentioned disciplinary violations

8. I know of other inmates at Montana State Prison who have been similarly harassed for providing legal assistance to other inmates.

FURTHER AFFIANT SAYETH NOT.

DATED this 1st day of ~~April~~ May, 1996.

/s/ Kevin Murphy
Kevin Murphy

SUBSCRIBED AND SWORN to before me this 1 day of ~~April~~ May, 1996.

/s/ Kenneth R. Cozly
Notary Public for the State of Montana Residing at
DearLodge, MT

(Notarial Seal)

My commission expires
11-19-97

JEFFREY T. RENZ
Sharon Noel, Intern
Montana Defender Project
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of all other persons similarly situated, Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	No. CV 95-62-H-CCL PLAINTIFF'S STATEMENT OF DISPUTED ISSUES

Plaintiff submits the following Statement of Disputed Issues in opposition to Defendants' Motion for Summary Judgment.

1. "High side" law clerks were permitted to assist inmates in Maximum Security and Administrative Segregation even though they were not permitted to see those inmates face to fact. (Murphy Supp. Aff. ¶¶ 3, 4.)

2. "High side" law clerks were not restricted to providing assistance only to inmates assigned them by the Library Director. (Murphy Supp. Aff. ¶ 5.)

3. Murphy had assisted Pat Tracy many times over a period of ten years. (Murphy Aff. ¶ 6; Tracy Aff. ¶ 9).

4. Murphy received a request for assistance from Tracy in February 1995. (Murphy Aff. ¶ 7; Tracy Aff. ¶ 7).

5. Tracy wanted help in framing issues in connection with charges against him. (Tracy Aff. ¶ 8).

6. Murphy conducted an investigation which led to his letter to Tracy. (Murphy Aff. ¶¶ 7, 8).

7. The purpose of Murphy's letter was to help Tracy get his charges reduced. (Murphy Aff. ¶ 9).

8. Murphy did not believe or expect that his letter would be viewed by Galle. (Murphy Aff. ¶ 10).

9. Tracy never received the letter and pled guilty without pursuing or asserting the defense suggested by Murphy. (Tracy Aff. ¶ 11, 12).

10. Montana State Prison's policy regulating inmate-to-inmate correspondence does not prohibit such correspondence, but provides that such correspondence may be read by prison officers. (Pl. Ex. 2).

11. The policies under which Murphy was disciplined were found in Montana State Prison Policy No. 15-001. (Pl. Ex. 1).

12. The Inmate Law Clerk program encompasses, authorizes, and encourages the kind of assistance Murphy provided Tracy, for example, "offering advice concerning issues, format, and proper procedure," "defin[ing] issues in matters to be addressed through legal channels." (Pl. Ex. 3).

13. The Prison decided to satisfy inmates' right of access to the courts by providing a mix of law library, inmate law clerks, and law student assistance. (Pl. Ex. 4, at 1).

DATED: August 1, 1996

/s/ Jeffrey T. Renz
JEFFREY T. RENZ
Montana Defender Project
Attorney for Plaintiff

[Exhibits And Certificate Of Service Omitted]

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University of Montana
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(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of all other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	)	No. CV 95-62-H-CCL AFFIDAVIT OF PAT TRACY

STATE OF MONTANA)
: ss
County of Powell)

Before the undersigned, a notary public for the State of Montana, personally appeared Pat Tracy, who, having been duly sworn, on his oath deposes and says that this affidavit is made on his personal knowledge, and that if he were to appear as a witness in the above-captioned matter, he would competently testify as follows:

1. I am an inmate confined at Montana State Prison, Deer Lodge, Montana.

2. I am from Butte, Montana.

3. I am housed on the high security side of Montana State Prison and was housed there in late 1994, early 1995.

4. On August 11, 1994, I was charged by information with felony assault.

5. On August 11, 1994, I asked for my own attorney.

6. On August 25, 1994, I was appointed counsel.

7. I requested the legal assistance of Kevin Murphy, an inmate law clerk through Dave Beatty, prison librarian, through prison kites, and by passing the word to Murphy.

8. I wanted Kevin Murphy's assistance with those charges pending against me and with framing the issues.

9. Kevin Murphy has provided me with legal assistance many times dating back to the mid-1980's including an appeal to the 9th circuit.

10. I was told that I could only see the low side law clerks. A low side law clerk came to speak with me. I refused to talk to him because this law clerk had a reputation for disclosing information obtained from meeting with inmates.

11. I never received the February 16, 1995 letter sent by Kevin Murphy to me and did not get a copy of it until June 1996.

12. To avoid the risk of a persistent felony offender enhancement by the County Attorney, I pled guilty to felony assault.

FURTHER AFFIANT SAYTH NOT.

DATED this 12th day of July, 1996.

/s/ Pat Tracy
Pat Tracy

SUBSCRIBED AND SWORN TO BEFORE ME this 12 day of July, 1996.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

/s/ [Illegible]
Notary Public,
State of Montana
Residing at _____,
Montana
My Commission
expires: _____

(Notarial Seal)

NOTARY PUBLIC for the State of Montana
Residing at Deer Lodge, Montana
My Commission Expires
September 3, 1998

JEFFREY T. RENZ
SHARON M. NOEL, Legal Intern
Montana Defender Project
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of all other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al, Defendants.	)	No. CV 95-62-H-CCL SUPPLEMENTAL AFFIDAVIT OF KEVIN MURPHY
STATE OF MONTANA County of Powell	) : ss	

Before the undersigned, a notary public for the State of Montana, personally appeared Kevin Murphy, who, having been duly sworn, on his oath deposes and says that this affidavit is made on his personal knowledge, and that if he were to appear as a witness in the above-captioned matter, he would competently testify as follows:

1. I am from Butte, Montana.

2. I am housed on the high security side of Montana State Prison.

3. I have assisted inmates in both the high security and maximum security units. This was true even during the period when the high security inmates did not go to maximum security. Although we could not go to the maximum security unit, we could still correspond with and assist inmates there. I had never been disciplined for doing this. All of this was done with the knowledge and approval of the library director and other members of the prison staff.

4. No one ever directed that I, or any other law clerk, stop providing or continuing to provide assistance to maximum security inmates or inmates in administrative segregation (lockdown).

5. On the high security side the process of providing assistance to inmates was informal. Sometimes inmates wanting legal assistance would send in a kite to the library director, Dave Beatty, and he would assign those inmates to a law clerk. Sometimes inmates would walk-in to the library during library hours and request assistance from Dave Beatty. In those cases the process was "first come, first served" unless the inmate asked one of the law clerks specifically for help. Finally, inmates sent in written requests addressed to a particular law clerk and that law clerk would respond directly.

6. I have a history of assisting Pat Tracy. Beginning in the mid-1980's, I assisted Pat in my capacity as an inmate law clerk with numerous writs and appeals in both the

state and federal courts, including an appeal to the 9th circuit.

7. In early 1995, I had been out of prison for a short time before Pat asked for my assistance. On or about February 1, 1995, I received a request from Pat for my assistance. I began to investigate the assault charges against Pat.

8. Through my investigation I found that Officer Galle had made homosexual comments to other inmates and that a petition was circulating accusing him of wrongful conduct and requesting his transfer.

9. On or about February 16, 1995, I wrote a letter to Pat Tracy to try and help him and get the charges dropped to a misdemeanor.

10. I was aware that Montana State Prison officials would read the contents of my letter to Pat Tracy. I did not believe that Officer Galle would read the letter. In fact, to this day, I do not think that Officer Galle has seen it.

FURTHER AFFIANT SAYETH NOT.

DATED this 12th day of July, 1996.

/s/ Kevin Murphy
Kevin Murphy

SUBSCRIBED AND SWORN TO BEFORE ME this 12th day of July, 1996.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

/s/ [Illegible]
Notary Public,
State of Montana
Residing at _____,
Montana
My Commission
expires: _____

(Notarial Seal)

NOTARY PUBLIC for the State of Montana
Residing at Anaconda, Montana
My Commission Expires August 24, 1998

JEFFREY T. RENZ
SHARON M. NOEL, Legal Intern
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(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	No. CV 95-62-H-CCL REQUEST FOR JUDICIAL NOTICE (Filed Aug. 2, 1996)

Plaintiff Kevin Murphy respectfully requests this Court to take Judicial Notice of the following facts or documents pursuant to Rule 201 of the Federal Rules of Evidence:

1. The Montana State Prison policy statement on Inmate Discipline, MSP 15-001, revised September 1989 – Rev. 2, marked and attached as exhibit 1.

2. The Montana State Prison policy statement on Inmate Correspondence, MSP 16-001, Revised October, 1992, with attachment #1 included, marked and attached as exhibit 2.

3. The Inmate Legal Clerk program description developed between the Montana Defender Project and Montana State Prison, marked and attached as exhibit 3.

4. The agreement between the Department of Corrections and University of Montana School of Law, marked and attached as exhibit 4.

5. That the Montana State Prison population at Deer Lodge, Montana averages between 1220 and 1340 inmates.

This Court may take judicial notice of facts and documents "at any stage of the proceeding." Rule 201(f), Fed. R. Evid. Judicial notice is mandatory when requested by a party if the Court is provided "the necessary information." Rule 201(d).

WHEREFORE Mr. Murphy respectfully prays that this court take judicial notice of the foregoing.

DATED this 8th day of August, 1996.

/s/ Jeffrey T. Renz
JEFFREY T. RENZ
One of Plaintiff's Attorneys

/s/ Sharon M. Noel
SHARON M. NOEL, Intern

[Exhibits And Certificate Of Service Omitted]

JEFFREY T. RENZ
SHARON M. NOEL, Legal Intern
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	)	No. CV 95-62-H-CCL MEMORANDUM IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

Petitioner Kevin Murphy has asked this Court to take judicial notice of the following facts or documents:

1. The Montana State Prison policy statement on Inmate Discipline, MSP 15-001, revised September 1989 – Rev. 2.

2. The Montana State Prison policy statement on Inmate Correspondence, MSP 16-001, Revised October, 1992, with attachment #1 included.

3. The Inmate Legal Clerk program description developed between the Montana Defender Project and Montana State Prison.

4. The agreement between the Department of Corrections and University of Montana School of Law.

4. [sic] The Montana State Prison population at Deer Lodge, Montana averages between 1220 and 1340 inmates.

These documents and facts can be catagorized into two areas: policy and regulatory statements of Montana State Prison and generally known facts.

Rule 201(b) of the Federal Rules of Evidence states "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The doctrine of judicial notice permits a judge to consider a generally accepted or readily verified fact as proved without requiring evidence to establish it. *United States v. Berrojo*, 628 F.2d 368 (5th Cir. 1980). Since the Montana State Prison population is readily known and can be easily verified, this Court may take notice of the fact that the prison population averages between 1220 and 1340 inmates.

Courts have also taken judicial notice of policies and procedures and regulations. In *United States v. George*, 971 F.2d 1113 (4th Cir. 1992), the Court took judicial notice of the county police's published policies and procedures for inventory searches. In *Northern Heel Corporation v. Compo Industries, Inc.*, 851 F.2d 456 (1st Cir. 1988) and *National Agricultural Chemicals Association v. Romminger*, 500 F.Supp. 465 (D.C. Cal. 1980) the Courts took judicial notice of OSHA regulations and California regulations.

Likewise, this Court may take judicial notice of Montana State Prison's policies and regulations governing inmate discipline/correspondence, the Department of Corrections/School of Law agreement and the law clerk program. All three documents are statements of policy and/or regulations governing the conduct of inmates or relationship with the University of Montana.

Since the documents are general policy or regulatory statements of Montana State Prison and, therefore, readily verifiable and the prison population is a generally known fact, petitioner requests this Court to judicially notice of his requests as meeting the standard set forth in Rule 201(b) of the Federal Rules of Evidence.

DATED: August 1, 1996

/s/ Jeffrey T. Renz
JEFFREY T. RENZ
One of Plaintiff's Attorneys

[Certificate of Service Omitted.]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY, Plaintiff, vs. ROBERT SHAW, Unit Sergeant; LARRY BEARLEY, Hearings Officer; MICHAEL MAHONEY, Defendants.	)	Cause No. CV 95-62-H-CCL **AFFIDAVIT OF MIKE MAHONEY**

STATE OF MONTANA)
:
Powell County)

THE UNDERSIGNED, Mr. Mike Mahoney, have first been sworn upon oath, deposes and says:

1. I am employed as the Montana State Prison (MSP) Warden.

2. Duties which I perform in the scope of my employment are to supervise the general operations of Montana State Prison, another duty I perform is to know the policies and procedures of MSP.

3. I am very familiar with Montana State Prison Policy 16-001 concerning inmate correspondence.

4. Policy 16-001 helps maintain the order of the institution by discovering other violations of institutional rules and plans to violate institutional rules such as:

a. rioting;

b. plots about correctional staff; and

c. plots to have inmates lie in due process hearings.

5. Policy 16-001 furthers the interests of institutional security, institutional order and inmate rehabilitation through the examination of inmate mail to maximum security.

6. Policy 16-001 protects the institution from inmates communicating escape plans to each other, arranging assaults or other violent acts on other inmates and from forming gangs and allowing communicating between gang members.

7. Policy 16-001 protects the security of the facility and furthers the safety of the correctional staff and inmates.

8. Policy 16-001 helps prevent inmates from planning, threatening or carrying out illegal activities through correspondence which include blackmail, extortion, conspiracy to commit assaults or homicides, dissemination of

drugs, sale of drugs and dissemination of other contraband.

9. No mail other than that listed in Paragraph 1, A, of Policy 16-001 is privileged correspondence which exempts certain categories of correspondence only serving the interest of allowing inmates to correspond with lawyers and other officials uncensored while preserving the security and safety concerns listed above.

10. The MSP Policy 16-001 does not exempt any inmates, including law clerks, because every inmate poses a potential risk to the security and safety of the institution through correspondence.

11. Persons who are inmate law clerks are not listed in Paragraph 1, A, of Policy 16-001.

12. Inmate law clerks are not an exempt category and thus have no special correspondence privileges.

13. Inmate law clerks are expected to correspond verbally with their duly-assigned clients.

14. All inmates should know that mail to maximum security may be opened and read according to the correspondence Policy 16-001.

15. The mail from Inmate Murphy to Inmate Tracy was not privileged according to MSP Policy 16-001.

16. Inmate Tracy was a maximum security inmate at the time Inmate Murphy sent the letter to Inmate Tracy and Inmate Tracy's mail was subject to being opened and read according to the policy.

Further affiant sayeth not.

DATED this 2 day of April, 1997.

/s/ Mike Mahoney
MIKE MAHONEY

SUBSCRIBED AND SWORN to before me this 2nd day of April, 1997.

/s/ [Illegible]
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
April 15, 2000

[seal]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN MURPHY, Plaintiff-Appellant, v. ROBERT SHAW, LARRY BEARLEY, MICHAEL MAHONEY, MYRON BEESON, and RICHARD DAY, Defendants-Appellees.	No. 97-35989 DC# CV 95-62-CCL D. Montana ORDER (Filed March 2, 1999)

The district court indicated that Appellant Kevin Murphy had been released on parole. *See* Order at 2 (D. Mont. filed Sept. 10, 1997). Because Mr. Murphy's release on parole raises issues of mootness, *see, e.g., Reimers v. Oregon*, 863 F.2d 630, 632 (9th Cir. 1988), he is hereby directed to inform this court, within seven (7) days of the filing of this order, of his current status: Is he currently incarcerated? If so, where? Is he currently charged or has he been convicted of felonies allegedly committed subsequent to his release on parole? Has his parole been revoked?

/s/ For The Court,
Cathy Catterson,
Clerk of Court
by: [Illegible]
Deputy Clerk

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN MURPHY, individually and on behalf of all other persons similarly situated, Plaintiffs and Appellants, -v- ROBERT SHAW, et al., Defendants and Appellees.	)	No. 97-35989 U.S.D.Ct. No. CV 95-62-H-CCL APPELLANT'S REPORT ON STATUS

Pursuant to the Court's Order of March 2, 1999, the Appellant Kevin Murphy states:

1. The Appellant is currently confined to the Montana State Prison, Great Falls Regional Prison. It is counsel's understanding that his confinement results from conviction of an additional felony.

2. Appellant's confinement was reflected by his Prisoner Authorization Form, filed with this court, pursuant to 28 U.S.C. § 1915(b), on February 12, 1998.

DATED: March 5, 1999

/s/ Jeffrey T. Renz
JEFFREY T. RENZ
Montana Defender Project
Attorney for Appellant

[Certificate of Service Omitted.]

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No. 99-1613

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY;
MICHAEL MAHONEY; MYRON BEESON;
AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution grant a state prison inmate an independent and freestanding right to assist another state prison inmate with a pending court case even if the State supplies other forms of legal assistance to the prison inmate?

PARTIES

All parties are listed in the caption.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 195 F.3d 1121 and reproduced at Pet. App. 1-17. The Court of Appeals' denial of Petitioners' petition for rehearing and suggestion for rehearing en banc is unreported. Pet. App. 45. The United States District Court for the District of Montana's decision is unreported and reproduced at Pet. App. 18-26. The Magistrate Judge's Order and Findings and Recommendation are unreported and reproduced at Pet. App. 28-44.

JURISDICTION

The Court of Appeals entered its judgment on November 4, 1999 and denied a timely petition for rehearing and suggestion for rehearing en banc on January 7, 2000. The Petition for Writ of Certiorari was filed on April 6, 2000. This Court granted certiorari on September 26, 2000 and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves application of the First Amendment to the United States Constitution as incorporated through section 1 of the Fourteenth Amendment. Respondent asserts claims for relief under 42 U.S.C. § 1983.

The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 of title 42, United States Code, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents the issue whether a state prison inmate has a freestanding First Amendment right to provide "legal advice" to another inmate, which right immunizes the first inmate from disciplinary sanctions for violation of an otherwise valid and uniformly applied prison disciplinary policy. The Ninth Circuit held that Respondent Kevin Murphy possessed just such a right with respect to statements made in a letter to a fellow inmate concerning a pending criminal proceeding in which the inmate already was represented by court-appointed counsel.

The Court of Appeals' judgment cannot withstand scrutiny. The lower court has carved out a new species of prisoners' rights for protection, effectively creating a "legal advice" privilege, and undermined the ability of States to regulate in perhaps the most difficult area of their myriad responsibilities – maintaining order and security in prisons. While it is not entirely clear whether the Court of Appeals' newly coined privilege is grounded in the Speech Clause or in freedom of association, it is plain under this Court's prison-regulation decisions that "legal advice" has no greater constitutional protection than other forms of communication or conduct except where protected under the Court's decisions defining an inmate's right to access the courts. As the Court has explained, "an inmate does not retain those First Amendment rights that are 'inconsistent with his legal status as a prisoner or with the legitimate penological objectives of the corrections system.' " *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Here, Respondent's right to communicate with other prisoners is subject to policies that unquestionably further those objectives.

I. Factual Background

1. Two Montana State Prison ("Prison") policies form the backdrop for this controversy: the Inmate Disciplinary Policy ("MSP 15-001") and the Inmate Correspondence Policy ("MSP 16-001"). J.A. 6, 34. Also relevant is an inmate legal clerk program established by the Prison and in operation during 1995. Request for Judicial Notice, Ex. 3 (Dist. Ct. C.R. 37).

a. The Prison has promulgated a policy that details a set of rules governing inmate discipline. The objective of the policy is "[t]o provide a means of maintaining discipline and enforcing necessary rules within the institution to ensure that prisoners are provided fair, timely, and impartial disposition of charges alleging violations of rules." MSP 15-001, Objective (J.A. 6). Under this policy, "[r]ule violations are divided into three categories." *Id.*, Policy (J.A. 6). The most severe category, "Class II violations," is at issue here and is defined as "[t]hose institutional infractions which are termed a major misconduct and are considered serious." *Id.*, Definitions (J.A. 7). Two Class II rules are germane here. The first – Rule 009 – prohibits "[i]nsolence," which is defined as "[w]ords, actions or other behavior which is intended to harass or cause alarm in an employee." Examples of "insolence" include "[c]ursing; abusive language, writing or gestures directed to an employee." *Id.*, Procedures § B (J.A. 10). The second – Rule 022 – prohibits "Interference With Due Process Hearings," which includes conduct such as "making a false statement of misconduct against . . . staff which could result in a disciplinary action." *Id.*, Procedures § B (J.A. 14).[1]

---

[1] A third Class II violation – Rule 025 – proscribes "Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution." MSP 15-001, Procedures § B (J.A. 15). It is defined as "purposefully engaging in acts which disrupt the institutional security or orderly operation [of the prison]" and "interfering with an employee in the performance of his/her duties." *Id.* Examples of conduct covered by Rule 025 include "[i]nterfering with an institutional count; missing count; interfering with a shakedown; knowingly interfering with the intent to disrupt an employee conducting a count or performing any routine security procedure." *Id.*

Under the policy, an officer who witnesses a violation completes an infraction report identifying the rule violated, the time and place of the incident, a description of the violation, names of witnesses and a description of the immediate action taken. MSP 15-001, Procedures § C.1 (J.A. 15-16). The policy cautions the officer writing the report to "describe what he saw, not his conclusions about what he saw." *Id.*, Procedures § C.2 (J.A. 16). A hearings investigator then is assigned the task of investigating each major misconduct report. *Id.*, Procedures § E (J.A. 18). Ultimately, the hearings officer "determine[s] if all necessary evidence has been gathered, weigh[s] the credibility of all witnesses, determine[s] the facts in the case, and decide[s] whether those facts amount to misconduct." *Id.*, Procedures § G.1 (J.A. 21). Detailed provisions govern the hearings officer's conduct of the disciplinary hearing and permissible sanctions. *Id.*, Procedures §§ G [*sic*] & H (J.A. 21-25).

If an inmate is unsatisfied with the hearings officer's decision regarding major misconduct offenses, he may appeal "to the Warden by filling out a written request for review including his reasons for review." MSP 15-001, Procedures § J.2 (J.A. 25). The inmate is then "notified in writing of the decision of the Warden." *Id.*, Procedures § J.6 (J.A. 26). Finally, if the "inmate is not satisfied with the decision of the Warden, he may consider instituting appropriate litigation." *Id.*, Procedures § J.7 (J.A. 26).

b. The Prison also has promulgated a detailed policy which addresses incoming and outgoing inmate mail. MSP Policy 16-001 (J.A. 34). The policy does not address inmate-to-inmate correspondence within the

Prison. It distinguishes between "privileged correspondence" and "general correspondence." The former category includes mail to and from "licensed attorneys" and various legal or advocacy entities such as the Montana Defender Project, the Montana Legal Services Association, the State Bar of Montana, the American Civil Liberties Union, the Civil Rights Division of the United States Department of Justice, and the National Association for the Advancement of Colored People. *Id.*, §§ 1.A, 2.A (J.A. 34-35). Outgoing privileged communications may not be opened by prison staff unless reasonable grounds exist to believe that the mail is being sent contrary to the policy (*id.* §§ I.B.2, VII.A (J.A. 35, 43); incoming mail may be opened only in front of the inmate for the purpose of determining the presence of contraband but may not be read by prison staff (*id.* I.C.2 & .3 (J.A. 35)). Outgoing nonprivileged correspondence generally may not be opened (*id.* II.B.4 (J.A. 36)), but incoming nonprivileged correspondence is subject to being reviewed if, inter alia, "it is from another correctional facility" or "is addressed to Maximum Security or Administrative Segregation inmates" (*id.* § II.C.3.a & .c (J.A. 37)).

All inmates were aware that mail sent to the maximum security unit may be opened and read according to MSP Policy 16-001. Respondent himself acknowledged that he was aware that his letter to an inmate in the maximum security facility would be opened and reviewed by prison officials. Pl.'s Stmt. Disputed Issues ¶ 10 (J.A. 81); *see also* Reply Br. Supp. Mot. Summ. J. & Opp'n Defs.' Summ. J. at 6 (Dist. Ct. C.R. 32) ("[t]he Prison has regulated and restricted [Respondent's] and other inmates' right by reading inmate-to-inmate mail, in

the exercise of their informed discretion"). Petitioner Mahoney, the Prison's warden, also stated in a 1997 affidavit filed in support of objections to the Magistrate Judge's recommended disposition that, with respect to correspondence to prisoners incarcerated in the facility's maximum security unit, "all inmates know that mail to [such unit] may be opened and read according to MSP Policy 16-001." Aff. Mike Mahoney ¶ 14 (J.A. 97). The District Court thus noted "the MSP policy of reading all inmate correspondence entering the Maximum Security Unit." Pet. App. 20.

c. The policy governing the legal clerk program in effect during 1995 defined as its overall purpose "[t]o assist inmates in accessing the courts by offering advice concerning issues, format and proper procedure." Inmate Legal Clerk Program – Montana Defender Project/Montana State Prison § I (Request for Judicial Notice, Ex. 3 (Dist. Ct. C.R. 37)). It required "inmates needing assistance [to] report to the Librarian in charge" who, in turn, was responsible for "assign[ing] the inmate to a legal clerk." *Id.* § VI.1 The policy additionally provided that "[i]nmate legal clerks may accept only those cases assigned to them." *Id.* § VI.3. The policy stated specifically that "[i]nmates seeking assistance are not entitled to the assignment of a particular inmate law clerk." *Id.* § IX.2. Special provisions governed the program's operation with respect to inmates in the maximum security unit, where "legal clerks [were to be] separated from Max . . . inmates by the use of the Max Visiting Room." *Id.* § III.3.

2. These prison policies became relevant here as a result of a letter from Respondent to another inmate, Pat

Tracy, in February 1995. Compl., Ex. 1 (J.A. 50). Respondent was a law clerk in the high security compound at the Prison. Tracy had been charged in state district court with felony assault of a prison guard and was incarcerated in the maximum security unit. Aff. Kevin Murphy ¶ 3 (J.A. 78); Aff. Pat Tracy ¶¶ 3, 4 (J.A. 84). He had been appointed counsel in the criminal proceeding. Despite the fact that he had counsel, Tracy requested the prison librarian to assign Respondent to assist him "with those charges against me and with framing the issues." *Id.* ¶¶ 6-8 (J.A. 84). That request was denied because prison policy prohibited inmates in the high security units from visiting inmates, like Tracy, in maximum security. Aff. Kevin Murphy ¶ 3 (J.A. 78).[2] Tracy was assigned a legal clerk housed in the Prison's "low-side." Aff. Pat Tracy ¶ 10 (J.A. 84). Tracy refused to speak with this clerk "because [he] had a reputation for disclosing information obtained from meeting with inmates." *Id.*

Even though not assigned to assist Tracy, Respondent sent him the following letter on February 16, 1995:

Dear Pat:

> How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally

---

[2] Respondent contended before the District Court that he had never been directed to "stop providing or continuing to provide assistance to maximum security inmates" and that "[o]n the high security side [of the Prison] the process of providing assistance to inmates was informal." Supp'l Aff. Kevin Murphy ¶¶ 4, 5 (J.A. 87). There is no dispute, however, that Respondent's assistance was not authorized under the legal clerk program policy's specific terms or that Tracy's specific request for such assistance had been denied.

> got everything taken care of. I can't come up to max anymore. [T]he lowside clerks go up there now. [T]hat's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another poiont [*sic*] is that he grabbed you from behind. You tell your lawyer to get ahold [*sic*] of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .
>
> Murph

Compl., Ex. 1 (J.A. 50). Respondent was aware that prison officials would read this correspondence. Supp'l Aff. Kevin Murphy ¶ 10 (J.A. 88).

Petitioner Shaw, a correctional officer, in fact read the letter. Shaw believed the letter violated several Class II rules under the Inmate Disciplinary Policy: Rule 009 – Insolence; Rule 022 – Interference with Due Process Hearings; and Rule 025 – Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution. MSP Policy 15-001, Procedures § B (J.A. 10, 14-15). He accordingly issued a separate Major Misconduct Violation Report for each alleged violation. The Rule 009 report read:

> While routinely monitoring institutional mail I (C.S. Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an over zealous guard who punishes and harasses Inmates for personal pleasure. Inmate Murphy also accussed [*sic*] CO Galle of making homosexual advances towards Inmates. Inmate Murphy stated that CO Galle retaliated against Inmate Murphy by writing him up on two rule violations.

Compl., Ex. 2 (J.A 52). In pertinent part, the Rule 022 report stated:

> While routinely monitoring institutional mail I (C.S. Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter, Inmate Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to "do something" about CO Galle but He (Murphy) was retaliated against.

> There is no evidence in of any the statements in this letter to be fact.

Id. (J.A. 54). Lastly, the Rule 025 report alleged that Respondent's comments were

> intended to persuade Inmate Tracy to perform certain actions to make a situation that Murphy is involved in look better. Inmate Murphy also stated "We must pursue this out of the Prison system." Inmate Murphy also stated "Well I will write again when I have this thing against Galle finished." Both statements are threatening.

Id. (J.A. 57). Respondent denied each of the violations. Compl., Ex. 3 (J.A. 59, 61).

Petitioner Bearley served as the hearings officer and concluded that Respondent had violated Rule 009 and Rule 022, but not Rule 025. With respect to Rule 009, he reasoned that the letter "states C/O Galle retaliated against inmate Murphy by issuing him a class II infraction" and that such "statement indicates unprofessional actions which stand to intimidate the employee." Compl., Ex. 3 (J.A. 60). A Rule 022 violation was found because "[t]he statement inferring to C/O Galle making homo sexual [*sic*] advances to another inmate would result in disciplinary action against stated employee of the D.O.C." *Id.* (J.A. 62). Petitioner Bearley imposed concurrent sentences of five days' detention for the offenses, which he suspended pending 90 days of "clear conduct." *Id.* (J.A. 59, 61). Respondent also received three points that could be used to reclassify him to a higher custody level. Aff. Kevin Murphy ¶ 6 (J.A. 78).

Petitioner Mahoney denied Respondent's appeal of Petitioner Bearley's adverse decisions. Aff. Kevin Murphy ¶ 7 (J.A. 78). Respondent did not raise in the proceedings below or elsewhere a claim based on an alleged absence of a sufficient quantum of evidence to support the findings that his conduct violated Rules 009 and 022. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985). Prison staff, finally, never delivered the letter to Tracy. He pled guilty in the criminal proceeding to assaulting the guard. Aff. Pat Tracy ¶¶ 11, 12 (J.A. 84).[3]

II. Proceedings Below

In October 1995 Respondent filed a class action under 42 U.S.C. § 1983 on his own behalf and that of present and future inmates and inmate law clerks. Compl. (J.A. 63). He alleged violation of the First Amendment because of "Defendants' practice of disciplining inmate law clerks for the content of their communications with other inmates" and denial of access to the courts "by denying [inmates] the assistance of an inmate law clerk." *Id.* ¶ 17 (J.A. 66). Respondent further challenged Petitioners' enforcement of Rules 009 and 022 under the First Amendment and the Due Process Clause as vague and overbroad. *Id.* ¶¶ 20, 21 (J.A. 67). He sought declaratory and injunctive relief against such enforcement and against

[3] The other Petitioners, Myron Beeson and Richard S. Day, were not involved in Respondent's discipline. Petitioner Beeson was a bureau warden at the Prison in 1995, while Petitioner Day was director of the Montana Department of Corrections at that time. Beeson is currently a deputy warden; Day remains director of the Department.

"[d]isciplining inmate law clerks for communications with inmate clients." *Id.*, Prayer for Relief ¶ 4 c) (J.A. 68).

The parties filed cross-motions for summary judgment. The Magistrate Judge entered a recommended decision in February 1997 denying the motions, except with respect to Respondent's access-to-courts claim, on the ground that questions of fact existed relevant to application of the standards in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Pet. App. 28. The Magistrate Judge additionally recommended denial of Respondent's motion for class certification because he was no longer a legal clerk and because the number of clerks was insufficient so as to make their joinder impracticable under Fed. R. Civ. P. 23(a)(1). Pet. App. 43-44. Objections to the recommended disposition were filed by all parties.

The District Court granted Petitioners' motion for summary judgment and denied Respondent's class action certification motion. Pet. App. 18. The court rejected Respondent's First Amendment claim because Petitioners had justified adequately the inmate correspondence policy under *Turner* on the basis of an affidavit filed by Petitioner Mahoney. Pet. App. 22-23. It further found that the record showed Respondent had not been acting as an authorized legal clerk in his letter to Tracy, since the requisite assignment by the prison librarian had not occurred and since Respondent "was not permitted to work for inmate Tracy because both inmates resided in the high security side of the prison." Pet. App. 23-24. On the basis of this conclusion, the District Court held not only that Respondent's access-to-courts claim failed but also that the restraint on his ability to communicate did

not "exceed the inmate's sentence in an unexpected manner" so as to violate the Due Process Clause. Pet. App. 24. The court deemed Respondent's overbreadth and vagueness claims predicated on the existence of viable First Amendment and due process rights and therefore dismissed them because the Prison's correspondence policy satisfied *Turner*. Pet. App. 25. The court denied the class certification motion because Respondent was no longer a legal clerk.

Respondent appealed the grant of summary judgment. Pet. App. 6 n.4. The Court of Appeals reversed.[4] In

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[4] Before oral argument below, the Court of Appeals directed Respondent's counsel to answer certain questions about Respondent's custody status because of a statement in the District Court's decision indicating that Respondent had been paroled and the possibility of mootness. J.A. 99; *see also* Pet. App. 18. Counsel's response stated that Respondent was incarcerated in the Montana State Prison, Great Falls Regional Prison, as the result of committing an additional felony. J.A. 100. Respondent presently is incarcerated at the Prison in Deer Lodge, Montana, on concurrently running sentences for three felonies committed shortly after release from the Prison in September 1996. If the Court of Appeals' judgment is affirmed, declaratory relief would appear appropriate with respect to communications by Respondent containing, or purportedly containing, "legal advice," together with expungement of the major misconduct violations under Rules 009 and 022. *See* Mont. Admin. R. 20.25.504(2)(l) (Board of Pardons may consider in parole decisions "[t]he offender's conduct in the institution, including particularly whether the inmate . . . is clear of major disciplinary reports prior to the hearing"). The possibility of detention sanctions, the assessment of reclassification points, and the relevance of any major misconduct violations in an inmate's past institutional history to parole determinations may influence Respondent's willingness to offer "legal advice" absent such relief.

so doing, it relied upon a prior Ninth Circuit decision to hold that respondent had "a First Amendment right to assist other inmates with their legal claims." Pet. App. 6 (citing *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985)). The court then applied the four-part balancing test set forth in *Turner* and concluded that, in light of respondent's First Amendment right to assist other inmates with legal matters, the application of Montana's prison policies to Respondent's conduct was invalid and could not stand because it was " 'an exaggerated response.' " Pet. App. 14.

First, without citing to a legal or factual basis, the Court of Appeals stated that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." Pet. App. 12. The court sought to buttress this general conclusion with the observation that Petitioners "ha[d] little reason to enforce Rule 009 (Insolence) in this context, since it can easily shield corrections officers from any 'alarming' statements contained in inmate mail." *Id.* The court thus opined that "the 'logical nexus' here between the governmental interest and the application of the rules to law clerk correspondence is weak." Pet. App. 13.

Second, the Court of Appeals speculated that Respondent had no "alternative means to exercise his right to render legal assistance to maximum security inmates" whom he could not visit personally. Pet. App. 13. Effectively placing the burden on Petitioners to establish the existence of an "alternative means," the court rejected the contention that Respondent could have communicated with Tracy's appointed counsel directly

because "there is nothing in the record indicating that Murphy had access to that lawyer's name and address." *Id.*

Third, the Court of Appeals dismissed the claim that immunizing law clerks from discipline "based on the content of the legal advice they provide" would have any significant impact on the prison employees, inmates or resources. Pet. App. 13. It stated that Respondent did not seek immunity from correspondence being intercepted and reviewed and that prison officials therefore "could continue to monitor correspondence and discipline law clerks for any improper material *that does not relate to legal action.*" Pet. App. 13-14 (emphasis supplied). In the court's view, the Prison could reorganize its staffing patterns so that "corrections officers who directly interact with inmates are shielded from the mail" and that, with such reorganization, there would be no risk that officers would be exposed to "alarming" statements about themselves. Pet. App. 14. Lastly, the court posited that an "easy, obvious alternative[ ]" to enforcement of Rule 009 is the "shielding [of] correction officers who have direct contact with inmates from inmate mail" and added that "[t]he fact the prison officials will read the legal correspondence should be adequate protection against implementation of any plan to interfere with Due Process Hearings (Rule 022)." *Id.*[5]

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[5] In the remainder of its decision, the Court of Appeals declined to address the question whether interference "with law clerk mail infringes on inmates' right of access to the courts" in light of the *Turner*-based First Amendment ruling. Pet. App. 15.

SUMMARY OF ARGUMENT

1. To the extent the Court of Appeals relied on the Speech Clause in the First Amendment for its holding that Respondent enjoys immunity from discipline for statements made during the course of providing "legal advice," it ignored the teachings of *Turner v. Safley*, 482 U.S. 78 (1987), and other decisions of this Court. *Turner* instructs generally that, in light of the inordinately difficult undertaking embodied in prison administration, federal courts must accord wide-ranging deference to prison administrators – especially those responsible for state institutions. As a consequence, policies that are "reasonably related to legitimate penological interests" will be upheld under *Turner* against a claim that a constitutional right has been violated. *Turner* itself involved a First Amendment challenge to an inmate-to-inmate mail policy and stands for the proposition that prison administrators may sanction prisoners for the content of communications if the discipline is grounded in "neutral" criteria advancing otherwise appropriate institutional interests. *See Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989).

The Court of Appeals' conclusion that "legal advice" has special protection under the Speech Clause cannot be reconciled either with *Turner*'s particular facts or with

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The court also declined to resolve an as-applied vagueness challenge to Rules 009 and 022. *Id.* It did consider, and reject, Respondent's facial vagueness challenge to the rules because "the regulations certainly provide adequate notice to prisoners generally." Pet. App. 16. The court remanded the matter to the District Court "for the crafting of an appropriate remedy." Pet. App. 17.

application of the four *Turner* factors against which this Court measures the reasonableness of a prison policy. First, the mail regulation at issue in *Turner*, as applied at the involved facility, did not treat inmate correspondence dealing with legal matters differently than non-legal correspondence. This Court also referred approvingly to Federal Bureau of Prison regulations that stringently restricted inmate mail dealing with legal matters. It thus makes no sense to conclude, as the Ninth Circuit did, that Respondent could not be sanctioned pursuant to the Prison's discipline policy when the validity of the policy with respect to other forms of speech has been admitted.

Second, application of the *Turner* factors establishes that it is entirely reasonable for prison administrators to treat "legal advice" the same as other speech for purposes of discipline under MSP 15-001. The security concerns raised by mail containing "legal advice" are identical to those attendant to non-"legal advice" correspondence, while according special status to inmates who give "legal advice" may raise additional institutional difficulties. The discipline policy's application to mail containing "legal advice" also does not burden such correspondence to a greater degree than other speech. Finally, the difficulty in distinguishing "legal advice" from non-"legal advice" would impose far more than a de minimis burden on prison resources. Indeed, the last of these considerations is borne out by Respondent's own vacillating positions over whether his letter to Tracy is characterized properly as "legal advice."

2. To the extent the Court of Appeals relied on First Amendment associational principles to create a right to assist other inmates with "legal advice" immune from

application of MSP 15-001, it pursued a path foreclosed by *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977). *Jones* applied a reasonableness standard comparable to that in *Turner* in rejecting a Speech Clause and associational right challenge to prison regulations prohibiting, inter alia, inmate union solicitation. Here, it is doubtful that associational rights are even "barely implicated" by application of the discipline policy to "legal advice" communications, since the policy does not prohibit those communications but, instead, merely sanctions specified conduct that is found inconsistent with "reasonable considerations of prison management." The same result obtains when the factors identified in the later-decided *Turner* are applied.

3. The Court of Appeals' decision has the effect of expanding significantly the otherwise narrowly tailored access-to-court doctrine. In creating a new "legal advice" privilege under the First Amendment, the Ninth Circuit has upset the balance that this Court struck between non-interference with prison administration and inmates' ability to initiate proceedings concerned with the validity or the conditions of their incarceration. The lower court, in practical effect, has created a freestanding right to *receive* legal assistance, which this Court stated in *Lewis v. Casey*, 518 U.S. 343 (1996), did not exist, by creating a right to *give* such assistance. Here, moreover, the undisputed facts showed the absence of an access-to-courts claim. First, neither Respondent nor even Tracy possessed standing to maintain such a claim. *Johnson v. Avery*, 393 U.S. 483, 487 (1969); *Lewis*, 518 U.S. at 351. Second, Respondent's "legal

advice" to Tracy was directed to a criminal proceeding in which he had a court-appointed attorney. *Id.* at 353.

ARGUMENT

The Court of Appeals' decision described the nature of the First Amendment right "implicated" by Respondent's discipline in differing ways. At the beginning of its analysis, the court cited prior circuit authority for the proposition that his claim "turns on application of two established legal principles" – the first of which is "that inmates have a First Amendment right to assist other inmates with their legal claims." Pet. App. 6. The court later stated that the imposition of discipline on Respondent also implicated his First Amendment right to communicate by letter. Pet. App. 8-9. It then stated that the prior circuit authority – *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985) – had "held that [an inmate's] legal activities on behalf of other inmates implicated associational rights protected by the First Amendment" and that, "[t]o the extent such a right exists, the Prison's decision to discipline Murphy in the instant case undoubtedly interferes with that right." Pet. App. 9 (footnote omitted).

The Ninth Circuit's conclusions at their core ignore this Court's precedent which dictates that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the correctional system, to whose custody and care the prisoner has been committed in accordance with due process of law." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). As discussed in Part I, insofar as

the Court of Appeals relied on the Speech Clause to immunize communications containing purported "legal advice" from sanctions under a discipline policy that admittedly may be applied to other forms of speech and thereby created a "legal advice" privilege, it plainly erred under standards established by this Court. The Court of Appeals' reliance on associational interests as a basis for the same freestanding First Amendment "legal advice" privilege was also erroneous and is discussed in Part II. Finally, the incompatibility of the Ninth Circuit's newly created First Amendment "legal advice" right and the access-to-courts doctrine as developed by this Court is discussed in Part III.

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT "LEGAL ADVICE" CONVEYED FROM ONE INMATE TO ANOTHER INMATE ENJOYS PROTECTED STATUS UNDER THE SPEECH CLAUSE IN THE FIRST AMENDMENT.

A. This Court's Prisoner Mail Decisions Establish That Prisons May Prohibit, Censor, and Punish Under "Neutral" Criteria Inmate-to-Inmate Mail Without Violating the First Amendment's Speech Clause.

This Court has addressed the relationship of inmate mail regulation and the First Amendment in several decisions. The first of these cases, *Procunier v. Martinez*, 416 U.S. 396 (1974), involved a challenge to California administrative rules that authorized censorship of prisoner mail received from or sent to persons, other than licensed attorneys and public office holders, outside the institution – i.e., "outgoing" or "incoming" mail. Those rules

permitted review of the mail to determine compliance with certain standards prohibiting, inter alia, "letters in which [prisoners] 'unduly complain' or 'magnify grievances[ ]' " or "express[ ] inflammatory political, racial, religious or other views or beliefs." *Id.* at 399; *see also id.* at 415 (discussing mailroom checklist used at one facility that "authorized rejection of letters 'criticizing policy, rules or officials[ ]' "). The Court initially emphasized that, "[t]raditionally, the federal courts have adopted a broad hands-off attitude toward problems of prison administration" because "the problems of prisons are complex and intractable, and, more to the point, they are not readily susceptible to resolution by decree." *Id.* at 404-05. "Courts," in short, "are ill-equipped to deal with the increasingly urgent problems of prison administration and reform[,]" and deference to prison administrators – particularly where state facilities are under scrutiny – is warranted. *Id.* at 405.

The *Martinez* Court nevertheless recognized its obligation "to take cognizance of valid constitutional claims whether arising in federal or state institutions." 416 U.S. at 405. Where incoming and outgoing inmate mail was involved, such claims presented special difficulties because not only the First Amendment speech rights of prisoners were implicated but also those of nonprisoners. *Id.* at 409. Since the regulations affected both prisoners and nonprisoners, the Court stated that prison officials "must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation" and that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of

the particular governmental interest involved." *Id.* at 413-14. The California policy did not pass muster under these rigorous criteria, since the prison officials had contended "not that the regulations are justified by a legitimate state interest but that they do not need to be" and since, in fact, the "regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration." *Id.* at 415-16.

That the stringent standard set in *Martinez* was premised on the constitutional rights of the non-incarcerated party and that far more deference must be accorded prison administrators with respect to regulation of inmate-to-inmate communications was made clear thirteen years later in *Turner*. There, the Court distinguished *Martinez* and rejected a strict scrutiny standard for reviewing prison regulations. In so ruling, the Court explained that its decisions since *Martinez* had held that the proper standard was whether the prison regulations were " 'reasonably related' to legitimate penological objectives." 482 U.S. at 87.[6] The *Turner* Court embraced

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[6] *Pell v. Procunier*, 417 U.S. 817, 826 (1974) (prohibition against in-person media interviews with inmates but not visitations from families, clergy, attorneys, and friends of prior acquaintance; "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded latitude' "); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977) (prohibition of prisoner union mailings, meetings and solicitations; "[a]n examination of the potential restrictions on speech or association that have been imposed by the regulations under challenge[ ] demonstrates that the restrictions imposed are reasonable, and are consistent with the inmates' status as

this deferential standard and the sharp curtailing of inmates' speech rights for two reasons.

First, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." 482 U.S. at 89; *see Jones*, 433 U.S. at 129 ("[p]risons, it is obvious, differ in numerous respects from free society" because they "are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance"). Second, adoption of a strict scrutiny standard would mean that "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.* Four factors then were distilled from the earlier prisoners' rights cases to guide the

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prisoners and with the legitimate operational considerations of the institution"); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (restriction on incoming hardback book mailings; "judicial deference is accorded not merely because the [prison] administrator will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial"); *Block v. Rutherford*, 468 U.S. 576, 586 (1984) (prohibition of "contact" visitations; given absence of dispute over internal security as a legitimate governmental interest, "our inquiry is simply whether petitioners' blanket prohibition on contact visits . . . is reasonably related to the security of that facility").

reasonableness assessment: (1) whether there was "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates[ ] and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives." *Id.* at 89-90.

Applying the four-factor test, this Court upheld the incoming inmate-to-inmate mail prohibition. It relied on testimony from Missouri prison officials concerning the potential of employing such mail to facilitate unlawful gang activity; the fact that "the correspondence regulation does not deprive prisoners of all means of expression;" a "tradeoff" between the exercise of the claimed First Amendment right by one class of inmates and "liberty and safety for everyone else, guards and prisoners alike;" and the prison officials' concerns over the feasibility of reading every piece of inmate mail so as to capture all dangerous messages and the accompanying conclusion that the alternative of individual letter review "clearly would impose more than a de minimis cost on the pursuit of legitimate correctional goals." 482 U.S. at 92-93.[7]

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[7] The Court applied these standards almost immediately outside a prison mail context in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), where it rejected a Free Exercise Clause challenge to a prison regulation that precluded work gang members from returning to the main prison building during the day except for emergencies. This Court both reiterated the general applicability of the "reasonably related to legitimate

Lastly, in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court again applied *Turner* standards in upholding Federal Bureau of Prisons regulations that authorized prison administrators to reject incoming publications deemed detrimental to institutional security or potentially capable of facilitating criminal activity.[8] The Court,

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penological interests" standard in resolving claims under the First Amendment and stressed with respect to the "alternative means" consideration that, although the rule made it impossible for Islamic prisoners to attend some religious services on Fridays, "[i]n *Turner*[ ] we did not look to see whether prisoners had other means of communicating with fellow inmates[ ] but instead examined whether the inmates were deprived of 'all means of expression.' " *Id.* at 352.

[8] In determining that *Turner*'s reasonableness standard controlled, the Court revisited *Martinez*. Although questioning whether the earlier decision "should, or need, be read as subjecting the decisions of prison officials to a strict 'least restrictive means' test" (490 U.S. at 411), it overruled *Martinez* to the extent the analysis there might have suggested applicability of the more stringent standard with respect to incoming correspondence where the sender was not a prisoner (*id.* at 413-14). The *Abbott* Court observed that, since "outgoing correspondence was the central focus of our opinion in *Martinez*" and "[t]he implications of outgoing correspondence for prison security are of categorically lesser magnitude than the implications of incoming materials[,]" an "attempt to justify a similar categorical distinction between incoming correspondence from prisoners . . . and incoming correspondence from nonprisoners would likely prove futile." *Id.* at 413. The Court additionally recognized that "it might have been possible to apply a reasonableness standard to all incoming materials without overruling *Martinez*" but chose "not to go that route . . . for we prefer the express flexibility of the *Turner* reasonableness standard." *Id.* at 414.

inter alia, found the regulations to be "neutral," notwithstanding the need for assessment of an individual publication's content, because "prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security" (*id.* at 415) and because wardens themselves were required to make the assessments (*id.* at 416). With respect to consideration of the "alternative means of exercising the right," the Court reiterated that, in *Turner*, "it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available." *Id.* at 418. It was unpersuaded by criticism of the Federal Bureau's "all-or-nothing rule" under which the entire publication, and not merely objectionable pages, was censored given prison administrators' "fear that tearing out the rejected portions and admitting the rest would create more discontent than the current practice." *Id.* at 418-19. The Court reasoned that "when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*" and that "administrative convenience of this proposed alternative is also a factor to be considered." *Id.* at 419. All in all, "the broad discretion accorded prison wardens by the regulations . . . is rationally related to security interests." *Id.* at 416.

At least two principles relevant to whether the Speech Clause creates a freestanding "legal advice" privilege can be drawn from these inmate mail decisions. First, *Turner* significantly curtailed prisoners' First Amendment

rights by extending a substantial measure of deference to prison administrator determinations concerning appropriate forms of inmate regulation, including permitting or prohibiting inmate mail based on content. Challengers to prison regulations accordingly bear a "heavy burden of showing that these officials have exaggerated their response to the genuine security considerations that actuated these restrictions and practices." *Bell v. Wolfish*, 441 U.S. 520, 562-63 (1979). Second, implicit in the right to censor all inmate-to-inmate mail is the right to adopt disciplinary rules that sanction prisoners for the content of such correspondence so long as the punishment is grounded in "neutral" criteria, i.e., criteria that are intended to advance otherwise appropriate institutional interests. As discussed in Subpart B, these principles mean that prison administrators are not required by the Speech Clause to give special status to "legal advice."

B. *Turner* Establishes That the Speech Clause Does Not Specially Protect Inmate-to-Inmate Mail Purporting to Contain "Legal Advice" From Application of Disciplinary Policy Which Admittedly May Be Applied to Communications With Other Content.

1. *Turner* is particularly relevant to whether speech concerned with legal matters is situated differently for First Amendment purposes than speech directed to non-legal issues. The Missouri Division of Corrections had promulgated regulations that prohibited mail between prisoners in different penal facilities except for three situations: correspondence " 'with immediate family

members who are inmates in other correctional institutions[;]' " correspondence "between inmates 'concerning legal matters[;]' " and correspondence when " 'the classification/treatment team of each inmate deems it in the best interests of the parties involved.' " 482 U.S. at 81-82. The *Turner* litigation, however, focused on one facility, the Renz Correctional Institution, and this Court pointed to a district court finding of a substantially more restrictive practice there. *Id.* at 82. The referenced finding of the trial court stated:

> The provisions of the divisional correspondence regulation allowing the classification/treatment team of each inmate to prohibit inmate-to-inmate correspondence have not been followed at Renz. . . . At Renz, however, the rule as practiced is that inmates may not write non-family inmates or receive mail from non-family inmates. The more restrictive practice is set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The restrictive rule at Renz is commonly known throughout the Missouri Correctional System.

Safley v. Turner, 586 F. Supp. 589, 591 (W.D. Mo. 1984), *aff'd*, 777 F.2d 1307 (8th Cir. 1985), *aff'd in part & rev'd in part*, 482 U.S. 78 (1987). The district court further stated in a later finding:

> Under an unwritten rule at Renz, prior approval is required before an inmate may write to another inmate regarding legal matters. Absent this approval, inmate-to-inmate legal mail routinely is opened, stopped, and refused in violation of the Department of Corrections' written rule.

Id.; *see also Safley v. Turner*, 777 F.2d 1307, 1310-11 (8th Cir. 1985) ("[t]he challenged rule, both on its face and as applied, purports to eliminate all manner of correspondence between inmates not 'approved' by the classification/treatment team"), *aff'd in part & rev'd in part*, 482 U.S. 78 (1987). There was thus no dispute that, at the Renz facility, correspondence dealing with legal matters was regulated in much the same, if not the same, manner as other correspondence between non-family members.

That the mail policy at the Renz facility was more restrictive than the Division of Corrections' rule was discussed in the *Turner* majority opinion and in the concurring and dissenting opinion. 482 U.S. at 93 n.*; *id.* at 105-12 (Stevens, J., concurring in part and dissenting in part). Responding to Justice Stevens' contention concerning the unreasonableness of "the total ban on correspondence between inmates at Renz and unrelated inmates in other correctional facilities" (*id.* at 105), this Court noted that, aside from differences in institutional security concerns between the Renz facility and other Missouri prisons, "the Renz rule is consistent with the practice of other well-run institutions, including institutions in the federal system" (*id.* at 93 n.*). Under Federal Bureau of Prisons regulations then in effect, inmate-to-inmate correspondence was quite restricted:

> An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution, providing the other inmate is either a member of the immediate family, or is a party or a witness in a legal action in which both inmates are involved. The Warden may approve such correspondence in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:
>
> (a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate); and
>
> (b) The Wardens of both institutions must approve of the correspondence.

28 C.F.R. § 540.17 (1986).[9] Given the absence of any suggestion in *Turner* that an outright prohibition of inter-prisoner correspondence containing "legal advice" and the Court's explicit recognition that in "well-run institutions" such correspondence is regulated more stringently than alleged by Respondent, there is no basis upon which to conclude that inmate-to-inmate mail concerned with legal proceedings is not situated comparably for First Amendment purposes with mail containing other content. That, however, is what the Court of Appeals did below: It has required prison administrators to treat inmate-to-inmate "legal advice" differently than any other type of prisoner correspondence.

2. The conclusion warranted by the language of the prison policy approved in *Turner* additionally comports with that decision's reasonableness standard. It makes

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[9] Section 540.17 was modified subsequent to *Turner* (61 Fed. Reg. 65,204 (1995)), but the first sentence of the regulation was not changed substantively. *See* 28 C.F.R. § 540.17 (1999).

perfect sense for prison administrators like Petitioners to treat correspondence that may contain "legal advice" the same as other forms of speech for purposes of prison discipline under MSP 15-001. Several general considerations and Respondent's own protean positions in this litigation bear witness to such reasonableness when measured under the four *Turner* factors.

First, the security concerns raised as an ordinary matter by inmate-to-inmate mail in *Turner* apply with equal force to correspondence that may contain "legal advice." Petitioner Mahoney's affidavit before the District Court identified various objectives underlying the Prison's correspondence policy, including discovering facts relevant to plots about correctional staff, plots concerning the use of false testimony, formation and activities of gangs, and anticipated or consummated illegal conduct. Aff. Mike Mahoney ¶¶ 4, 6, 8 (J.A. 96-94). It takes little imagination to envision inmates using coded communications in the form of "legal advice" to carry out or facilitate any of the activities identified by Warden Mahoney. *See Jones*, 433 U.S. at 132 ("The interest in preserving order and authority in the prison is self-evident. Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever present potential for violent conflict and conflagration"). Moreover, as members of this Court and the amici curiae States have recognized, the "legal advice" privilege created by the Court of Appeals carries with it unique possibilities for abuse and institutional disruption. *Johnson v. Avery*, 393 U.S. 483, 499 (1969) (White, J., dissenting) ("[m]any assert that the aim of the jailhouse lawyer is not the service of truth and

justice, but rather self-aggrandizement, profit, and power"); Amicus Curiae Br. States of Florida et al. at 8 (observing that the decision below has the potential to elevate "any inmate who purports to provide legal assistance" to a position of power). This sort of judgment call falls precisely into the area of prison-administrator discretion that the federal judiciary should not trench upon. *See Sandin v. Conner*, 515 U.S. 472, 486 (1995) (counseling "appropriate deference and flexibility to state officials trying to manage a volatile environment").

Second, application of MSP 15-001 in a non-discriminatory manner to "legal advice" does not burden the exercise of speech or other fundamental constitutional rights any more than application of the disciplinary policy to other forms of speech. Inmates may engage in both kinds of speech under exactly the same terms. The second *Turner* factor thus is satisfied because MSP 15-001 does not deprive prisoners of *any*, much less *all*, "means of [legitimate] expression." *Turner*, 482 U.S. at 78.

Third, it is possible for letters containing such advice also to discuss plainly non-legal matters, as did the last paragraph of Respondent's letter to Tracy. Prison administrators accordingly would be confronted with distinguishing between "legal" and "non-legal" advice to determine the scope of an inmate's immunity from discipline. Characterization of content as "legal" or non-"legal," needless to say, can be problematic. So, for example, the statement in the letter's first paragraph concerning Respondent's receipt of two retaliatory "writeups" from the guard was the basis for the Rule 009 violation. That statement only remotely, if at all, can be said to

relate to "legal advice" concerning Tracy's criminal proceeding, since whether those "writeups" were retaliatory has no relevance to whether the guard "provoked" the assault by Tracy. The same can be said about the allegation of the guard's homosexuality, the basis of the Rule 022 violation. The Court of Appeals itself made no effort to define what constitutes "legal advice" generally, and the absence of such an effort is understandable given the term's inherently uncertain scope. Prison administrators, meanwhile, are left with the day-to-day, letter-by-letter task of making virtually instantaneous determinations concerning whether correspondence contains "legal advice." This line-drawing would tax the most skilled of jurists who have the luxury of time. The corresponding burden would have an undoubted " 'ripple effect' . . . or prison staff" (*Turner*, 482 U.S. at 90) and "clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals" (*id.* at 93) – consequences relevant to the third and fourth *Turner* considerations.

Respondent's own vacillating positions reveal the difficulties in characterizing particular content as "legal advice." His complaint requested, inter alia, relief "[d]eclaring that the Defendants' practice of disciplining inmate law clerks based on the content of their advice to other inmates violates the clerks' and inmates' rights pursuant to the First Amendment and 28 U.S.C. § 2254" – relief that would have been irrelevant unless his letter to Tracy purportedly contained "legal advice." Compl., Prayer for Relief ¶ 3 (J.A. 67-68). Before the Court of Appeals, his principal brief argued that "the essence of Murphy's communication was, 'don't plead guilty, you

may have a defense predicated upon the guard's reputation for treatment of other inmates' " and that "[t]his was good advice, since Montana admits evidence of the character of the alleged victim to support a claim of self defense." Br. Appellant at 17. Respondent's brief continued on to underscore the "legal advice" nature of the letter to Tracy:

> Had Murphy said, "I think you have a good defense under [*State v. Shadwell*, 57 P. 281 (Mont. 1899)]," we certainly would conclude that his communication was proper and not punishable. But Murphy wrote about the traits themselves. If Murphy had paraphrased *Shadwell* (i.e., "Galle has made threats and has a reputation for violence to inmates") could we say anything different? . . . The Prison has never offered evidence that connects arguably valid advice to any legitimate penological interest.

Id. at 18. Before this Court, though, Respondent took a strikingly different tack, contending that "[t]here is a great distinction between 'writ writing' and Murphy's letter" and, after a description of a legal clerk's duties at the Prison, that:

> Murphy's letter does not fit well under these functions. Rather, his letter is akin to that from a witness in a legal proceeding. ("Tell your lawyer to get a hold of me on this (and this is why)," Murphy wrote.) This is witness language, not lawyer language.

Br. Opp'n Pet. Writ Cert. at 4. This Court should not foster this type of language-parsing and the concomitant burden on state and federal prison administrators.

Finally, it warrants emphasis that the Court of Appeals' analysis is replete with precisely the sort of judicial second-guessing that *Turner*'s reasonableness test is designed to preclude. The court believed, with reference to the first *Turner* factor, that "[t]he Prison . . . has little reason to enforce Rule 009 (Insolence) in this context, since it can easily shield correction officers from any 'alarming' statements contained in inmate mail." Pet. App. 12. The panel relied exclusively on its "shielding" rationale in applying the third and fourth *Turner* considerations. Pet. App. 14. It is nonetheless unclear how prison administrators can prevent correction officers from gaining knowledge indirectly of such statements once communicated from one inmate to another. As to the second factor, the Court of Appeals dismissed out of hand the suggestion that Respondent had an alternative means of conveying his "legal advice,"i.e., sending the letter to Tracy's attorney, with the statement that "nothing in the record indicat[es] that Murphy had access to that lawyer's name or address." Pet. App. 13. There is no reason to doubt, however, Respondent could have made efforts to learn the attorney's identity from Tracy or others, and he bore the burden – which was not carried below – to show the contrary. *O'Lone*, 482 U.S. at 350 ("placing the burden on prison officials to disprove the availability of alternatives . . . fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators").

II. THE COURT OF APPEALS' RELIANCE ON FIRST AMENDMENT ASSOCIATIONAL RIGHTS FOR ITS "LEGAL ADVICE" EXCEPTION TO THE APPLICATION OF THE DISCIPLINARY POLICY CANNOT BE RECONCILED WITH *JONES*.

Aside from the Speech Clause, the Court of Appeals relied on a First Amendment associational interest "to assist other inmates with their legal claims" (Pet. App. 6) as a basis for establishing a freestanding "legal advice" right to immunity from application of MSP 15-001. It cited as the sole authority for this proposition the Ninth Circuit's pre-*Turner* decision in *Rizzo*. Pet. App. 6, 8, 9. In so holding, the court ignored *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), a decision which controls the right-of-association analysis here.[10]

---

[10] Other than shedding light on the nature of the Court of Appeals' reasoning, the decision in *Rizzo* adds nothing. *Rizzo* relied on a Tenth Circuit decision, *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981), to find the plaintiff inmate's allegation that, inter alia, "he encouraged and offered to help his fellow students in the vocational course in legal matters" sufficient to state a claim predicated on the theory that the First Amendment protects "any collective action . . . taken to obtain meaningful access to the courts." *Rizzo*, 778 F.2d at 531. *Owens* involved retaliation against a sheriff's department employee for assisting his spouse with a sex discrimination suit against the department. Consequently, not only did *Owens* arise in a non-prison environment, but also it was concerned with a different type of "access to the courts" – that reflected in *NAACP v. Button*, 371 U.S. 415 (1963) – than that relevant to prisoners. *See generally* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 571-80 (1999) (contrasting access-to-court decisions in prisoner and "group litigation" contexts). The *Rizzo* panel did not note this distinction in concluding that the

Jones involved a challenge to a prison regulation prohibiting inmates from soliciting other inmates to join a prisoners' union, barring union meetings, and making the prison mail system unavailable for bulk mailings of union materials. At the outset, the *Jones* Court explained that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls" because "[t]he concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution" and "restrictions on the associational rights among inmates." 433 U.S. at 125-26. This Court then began its substantive analysis with the general deference principle reiterated subsequently in *Turner*:

> The invocation of the First Amendment, whether the asserted rights are speech or associational, does not change th[e] analysis. In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." . . . In seeking a "mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application," . . . this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. . . .

---

plaintiff inmate possessed a legally cognizable "first amendment right[ ]" to "bring[ ] and assist[ ] in civil rights litigation." 778 F.2d at 532. The panel below also did not acknowledge that distinction.

> These restrictions have applied as well where First Amendment values were implicated.

Id. at 129-30 (citations omitted). The Court found speech rights "barely implicated" by the mail restriction since it affected only the cost attendant to distribution of union material and since "other avenues of outside informational flow by the Union remain available." *Id.* at 130-31. Inmate-to-inmate solicitation of union membership also was held outside Speech Clause protection because, as "an invitation to collectively engage in a legitimately prohibited activity," such solicitation "involves a good deal more than the simple expression of views as to the advantages or disadvantages of a union or its views." *Id.* at 131-32. As for associational interests, the Court stated that "the presence, and perhaps even the objectives, of a prisoners' labor union would be detrimental to order and security of the prisons" and that "[i]t is enough to say that [the prison administrators] have not been conclusively shown to be wrong in this view." *Id.* at 132.

Here, one is hard-pressed to say that associational rights are even "barely implicated" by uniformly imposed, content-neutral disciplinary rules. MSP 15-001 does not preclude inmates from giving "legal advice" to other inmates. Rather, it sanctions specified conduct that is admittedly inconsistent with "reasonable considerations of penal management" without reference to whether that conduct occurs while communicating such advice. *See Jones*, 433 U.S. at 132. The Court of Appeals' characterization of "the Prison's interest in security and order" as being "at a low ebb" (Pet. App. 12) when "legal advice" is being given thus misses the mark badly. Prisoner administrators *always* have an intense "interest in

security and order," and any First Amendment associational rights attendant to the exchange of "legal advice" must give way. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("central to all other correctional goals is the institutional consideration of internal security within the correctional facilities themselves").

Moreover, while *Jones* focused on the overall question whether the involved regulation was reasonably related to legitimate penological interests and did not address separately the considerations later identified in *Turner*, each of those considerations is satisfied here. The first and third *Turner* factors are met because MSP 15-001 admittedly furthers the Prison's interest in security and order and because recognizing a "legal advice" privilege to that policy's application would open the door to conduct potentially impairing institution security or safety interests. The second and fourth are satisfied because nothing in the disciplinary policy precludes an inmate giving "legal advice" to a fellow inmate so long as the disciplinary policy is not violated otherwise.

Jones teaches unambiguously that inmates retain only a modicum of First Amendment associational rights. The Ninth Circuit has sought to expand significantly those rights *and* elevate them above prison administrators' concern for safety and security. Associational interests cannot support such an independent, freestanding right for prisoners to render legal advice in the face of these administrators' responsibility for maintaining institutional integrity through policies like MSP 15-001.

III. THE COURT'S ACCESS-TO-COURTS DOCTRINE DEFINES THE SCOPE OF AN INMATE'S CONSTITUTIONAL ENTITLEMENT TO LEGAL ASSISTANCE FROM A FELLOW INMATE.

The Court of Appeals' Speech Clause and associational right analysis was flawed for another reason: By attaching constitutional status to assistance with any "legal claims," it effectively expands the access-to-courts doctrine through which this Court has accommodated the interest that prisoners have with the validity or conditions of their incarceration. This conclusion becomes strikingly evident when the basic contours of that doctrine are examined in the Court's three most relevant decisions applying it: *Johnson v. Avery*, 393 U.S. 483 (1969); *Bounds v. Smith*, 430 U.S. 817 (1977); and *Lewis v. Casey*, 518 U.S. 343 (1996).

In *Johnson*, the Court invalidated a Tennessee prison regulation that prohibited any inmate from "advis[ing], assist[ing] or otherwise contract[ing] to aid another, either with or without a fee, to prepare Writs or other legal matters." 393 U.S. at 484. The petitioner inmate had been disciplined for the regulation's violation, and this Court found that the practical effect of the writ-writing prohibition was to "forbid[ ] illiterate or poorly educated prisoners to file habeas corpus petitions" (*id.* at 487), since the State did "not provide an available alternative to the assistance provided by other inmates" (*id.* at 488). This Court concluded that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to

other prisoners." *Id.* at 490. Significantly, therefore, rather than creating a freestanding right to assist other inmates as the court below has done, this Court has found such a right to exist only in the absence of alternative forms of legal assistance. *Id.* at 489.

The contours of this right were made more concrete in *Bounds*. There, this Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

Lewis clarified *Bounds* in two respects. This Court explained as to Article III standing: "Insofar as the right vindicated by *Bounds* is concerned, 'meaningful access to the courts is the touchstone,' . . . and the inmate therefore must . . . demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351. *Bounds*, in other words, "did not create an abstract, freestanding right to a law library or legal assistance." *Id. Lewis* additionally made clear that the access-to-courts doctrine is concerned with "tools . . . that the inmates need to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement" and that "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.* at 355.[11]

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[11] As Justice Thomas discussed in his *Lewis* concurring opinion, this Court has not "engaged in a rigorous

The Court's *Lewis* decision strikes a constitutionally-rooted balance between the safe and orderly administration of prisons and the ability of inmates to initiate certain types of judicial proceedings. *See Lewis*, 518 U.S. at 350. The Ninth Circuit's approach, however, upsets this balance by expanding greatly the access-to-courts right through an additional restriction on prison administrators' authority; i.e., inmates like Respondent giving "legal advice" can couch retaliation or other claims as a violation of First Amendment rights and thereby avoid the need to show the far more stringent elements of a viable access-to-courts cause of action. Such a result makes no sense because, to the extent "legal advice" may have a value independent of other speech, that value is protected adequately by the access-to-courts doctrine. Any limitation on a prison's authority with respect to controlling inter-prisoner communications over "legal advice"

---

constitutional analysis of the basis for the asserted right" of access to the courts (518 U.S. at 367), but it appears such right emanates from the First Amendment's Petition Clause or the Fourteenth Amendment's Due Process or Equal Protection Clauses. *Compare id.* at 381 (Thomas, J., concurring) (identifying the Due Process Clause as the apparent source), *with id.* at 405 (Stevens, J., dissenting) (identifying the Petition Clause as a principal source); *see also Hudson v. Palmer*, 468 U.S. 517, 523 (1984) ("[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts"). This issue, as well as the relationship between Speech and Petition Clause standards where an access-to-courts claim is involved, need not be resolved since, as discussed infra at 44, no such claim could be advanced here. *See McDonald v. Smith*, 472 U.S. 479, 485 (1985).

accordingly should come from application of that doctrine, not from the new right conjured out of the First Amendment by the Court of Appeals. *Cf. Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (First Amendment claim "ha[d] no independent significance" in view of the rejection of a due process claim when the latter claim "focused on substantially the same question – whether the process allow[ed] a claimant to make a meaningful presentation"). Indeed, the Ninth Circuit has done precisely what the *Lewis* Court stated *Bounds* did not do: Create a freestanding right to *receive* legal assistance by creating the right to *give* such assistance.

The insufficiency of Respondent's access-to-courts claim is apparent from the undisputed facts. First, Respondent does not allege that he has been denied access to the courts and thus could claim only his relationship to Tracy as a basis for the doctrine's application. This case, however, cannot be analogized to *Johnson* where a "writ-writer" secured relief from sanctions imposed for assisting other prisoners who had no other means to access the courts. *Johnson*, 393 U.S. at 487. Tracy, moreover, had a court-appointed, Montana-licensed attorney to represent him in the criminal proceedings. Even he therefore would have lacked standing under *Lewis* standards. *Lewis*, 518 U.S. at 351.

Second, the criminal proceeding against Tracy fell outside the reach of the access-to-courts doctrine. *See Lewis*, 518 U.S. at 355. Tracy was *haled* into court by the State on criminal charges and provided counsel. His plight was not that of an unaided inmate seeking to invoke the judicial process with the objective of attacking

an existing sentence or condition of confinement but denied the "tools" to do so.

The Court of Appeals, in sum, has asked the First Amendment to do the work of the access-to-courts doctrine. In so doing, the Ninth Circuit upsets the balance struck by this Court in that doctrine. The Court should reject the suggestion that the First Amendment immunizes Respondent's communications simply because they purported to give "legal advice" to a fellow inmate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

ROBERT SHAW, LARRY BEARLEY, MICHAEL MAHONEY, MYRON BEESON, and RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

May state prison officials, consistent with the First Amendment, punish an inmate for the contents of a letter he writes to another inmate who has been charged with assaulting a corrections officer, where (a) the letter offers information and advice relating to the defense of the assault charge, (b) the prison has no rule that forbids prisoners from writing letters to one another, and (c) the punishment is imposed because the information and advice criticizes the corrections officer?

PARTIES

All parties are listed in the caption.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Statement of Facts.

This case arose when the Petitioners (hereinafter "the Prison") punished a Montana State Prison inmate, Respondent Kevin Murphy, after he wrote a letter to another inmate, Pat Tracy. The letter contained information relevant to Tracy's defense to a criminal charge of assault on a prison guard. He also offered Tracy advice about the criminal charge. Murphy was punished because he made comments that criticized the prison guard, even though they were material to Tracy's defense.

The State of Montana admits evidence of the character of the alleged victim to support a claim of self defense. *See* Rules 404(a)(2); 405, Mont. R. Evid. (party may offer testimony about reputation of, and about specific instances of conduct by, alleged victim); *State v. Shadwell*, 22 Mont. 559, 572, 57 Pac. 281, 286 (1899) (holding evidence of prior threats and violent acts by deceased relevant to prove self defense). In the case at bar, the State of Montana charged Montana State Prison inmate, Pat Tracy, with assault on a prison guard, Glen Galle, in 1994. J.A. 84, ¶ 4.

Assault on a peace officer was and is a felony in Montana. Mont. Code Ann. § 45-5-202(2)(c) (1993). Because Tracy was serving a sentence for a prior felony, he faced up to 100 years confinement under Montana's "two strikes" statute. Mont. Code Ann. § 46-18-502(1) (1993); Tracy Aff., J.A. 84, ¶ 12.

Montana State Prison is divided into Minimum, High, and Maximum security "sides." Following the alleged assault, in accordance with Prison policy, the Prison moved Tracy from the High Security side to segregation in the Prison's Maximum Security unit. J.A. 78, ¶ 3.

Kevin Murphy was an inmate legal clerk on the High Security side of Montana State Prison, where Tracy had been housed. J.A. 78. Murphy had been appointed by the Prison and trained under the Prison's legal clerk program. The Prison adopted that program to satisfy its duties to provide means of access to the courts then required by *Bounds v. Smith*, 430 U.S. 817 (1977). C.R. 38, exhibit 4 at 1.

Initially, the Inmate Legal Clerk program provided that the Prison Librarian would assign cases to inmate legal clerks depending upon the clerk's case load. C.R. 38, Ex. 3. It is undisputed that, as the program evolved, the process of providing assistance became less formal. Sometimes legal clerks provided assistance on a first-come, first-serve, walk-in basis. The librarian also assigned legal clerks to inmates who sent written requests (called "kites.") At other times, inmate legal clerks provided assistance in response to requests sent directly to them. Murphy Aff. ¶ 5, J.A. 87.

The same rules applied if a requesting inmate was housed in the Prison's Maximum Security unit. Murphy Aff. ¶ 3, J.A. 87. Although the Prison decided that, for security reasons, High Security side legal clerks could no longer visit the Maximum Security unit (Max), it is undisputed that High Security legal clerks were not forbidden from providing assistance altogether and were still permitted to correspond with Max inmates. Murphy Aff., ¶¶ 3-4, J.A. 87. Other inmates who were not legal clerks were also permitted to correspond with Max inmates. J.A. 34, 36.

Tracy requested help from Murphy, who had provided Tracy with legal help on many occasions in the past. J.A. 87, ¶ 6. Tracy asked for Murphy's help on his case through several channels, including a request to the Prison's librarian. J.A. 84, ¶ 7. The librarian, who was in charge of the legal clerk program, told Tracy that High Security inmates were no longer allowed to visit the Maximum Security unit. Tracy Aff., ¶ 10, J.A. 84. He arranged for a Low Security side law clerk to see Tracy.

Id. That law clerk had a reputation for breaching confidences and Tracy therefore refused to speak with him. *Id.*

Tracy's requests and the charges against Tracy came to Murphy's attention. Murphy Aff. ¶ 3, J.A. 78. Although he was not permitted to visit Tracy, Murphy could look into reports that officer Galle had made sexual advances to inmates. Murphy Aff. ¶ 8, J.A. 88. Murphy learned that a number of inmates had circulated a petition complaining of Galle's wrongful conduct in other matters. *Id.*

According to the Prison's policy and his job description, Murphy's job was to "counsel with complaining inmates," to "define issues in matters to be addressed through legal channels," to instruct inmates in document preparation and legal research, and to instruct inmates on procedures in civil rights and post-conviction matters "and other forms of asserting claims." Inmate Legal Clerk Program 1; Law Clerk Job Description 1, C.R. 38, Ex. 3. The requirements for his position included "[b]asic understanding of criminal and civil procedure," the ability to perform research, experience in pleadings and forms, an ability to communicate well and to maintain a high level of professional confidentiality. *Id.*

Acting within the scope of those duties, on February 16, 1995, Murphy wrote to Tracy and summarized what he had learned. Murphy Aff., ¶ 9, J.A. 88, 50. Murphy wrote,

Dear Pat:

How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges.[1] Finally got everything taken care of. I can't come up to max anymore. [T]he lowside clerks go up there now. [T]hat's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will

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[1] Murphy had been out of prison for a short time. Murphy Aff. ¶ 7, J.A. 88.

write again when I get this thing against Galle finished.

Later. . . .

Murph

J.A. 50.

The Prison's Correspondence Policy (hereinafter the Mail Policy) permitted inmate-to-inmate correspondence, regardless of where the inmates were housed. Mahoney Aff. ¶ 14, J.A. 97. The Policy also permitted Prison officials to read those letters and its supervisory officers regularly did so. *Id.*, ¶¶ 14-16, J.A. 97. The Prison could also read Privileged Correspondence (letters to attorneys, judges, and other officials), "if there are reasonable grounds to believe that the mail is being sent contrary to this policy. . . . " Mail Policy VII. A, J.A. 43. Murphy thus knew that his letter would be read by prison officials before being delivered to Tracy. Murphy Aff. ¶ 10, J.A. 88. He did not believe that Officer Galle would see his letter, *id.*, J.A. 88, and it appears that Galle did not see the letter.

Petitioner Robert Shaw, the Correctional Supervisor in Murphy's housing unit, read Murphy's letter and began disciplinary proceedings against him.

Tracy never learned of the information in Murphy's letter. He did not see the letter until it was brought to his attention by Murphy's attorneys nearly 18 months later. Tracy Aff. ¶ 11, J.A. 94. By then he had pled guilty to felony assault in order to avoid being sentenced as a persistent felony offender. *Id.*, ¶ 12, J.A. 84.

After reading Murphy's letter, Shaw charged Murphy with violating Prison Disciplinary Rule 009 (Insolence),

Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution). J.A. 52, 54, 57. Murphy requested a hearing on all three charges. The hearing officer, Petitioner Larry Bearley, concluded that Murphy did not violate Rule 025 (Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution), but did violate Rule 009 (Insolence) and Rule 022 (Interference with Due Process Hearings). Br. for Pet. 11; Pet. for Writ of Cert. 6. His findings were based on the content of Murphy's letter.

Insolence is defined in Montana State Prison Policy No. 15-001, Rule 009, as "Words, actions or other behavior which is intended to harass or cause alarm in an employee." The Policy includes examples that explain its scope: "Cursing; abusive language, writing or gestures directed to an employee." J.A. 10.

Shaw's Insolence charge against Murphy alleged:

> While routinely monitoring Institutional mail, I (CS Shaw) noticed statements in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an overzealous guard who punishes and harasses inmates for a personal pleasure. Inmate Murphy also accused CO Galle of making homo-sexual advances towards inmates. Inmate Murphy stated that CO Galle retaliated against Murphy by writing him up on two rule infractions.

J.A. 52.

At Murphy's hearing, hearing officer Bearley concluded, with respect to the Insolence charge, "evidence states c/o Galle retaliated against inmate Murphy by

issuing Inmate Murphy a class II infraction. That statement indicates unprofessional actions which tend to intimidate the employee." J.A. 60.

Rule 022, "Interference with Due Process Hearings" is not defined in Policy No. 15-001. J.A. 14. Instead the Policy offers the following examples of what would constitute a violation of the rule:

> Intimidating or tampering with an informant or a witness, tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff that could result in a disciplinary action. (This violation should not be charged for as a [sic] retaliation for the writing of a grievance.)

Id.

Shaw's charge of "Interference with Due Process Hearings" alleged:

> While routinely monitoring institutional mail I (CS Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter, Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to "do something" about CO Galle, but He (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact.
>
> J.A. 54.

As to the Interference with Due Process charge, hearing officer Bearley concluded, "The statement referring to C/O Galle making homosexual advances to another inmate would result in disciplinary action against stated employees of the D.O.C." J.A. 62.

Murphy appealed both decisions to Warden Michael Mahoney, who denied the appeals. Murphy was sentenced to five days detention, which sentence was suspended. J.A. 59.

Neither Shaw nor any other Prison official charged or punished Murphy for violating any rule that governed his legal clerk duties. Further, no Prison official claimed that Murphy had violated the Prison Mail Policy.

II. Proceedings Below.

On October 24, 1995, Murphy filed a complaint against Petitioners in the United States District Court for the District of Montana alleging that they punished him for the content of his letter to Tracy. J.A. 63. Murphy alleged that Prison officials deprived him of his rights to free speech and of access to the courts. He brought his action "on his own behalf, as an inmate law clerk" and also brought "this action on his own behalf, as an inmate, subject to the disciplinary policies of the Department of Corrections. . . . " J.A. 65, ¶¶ 10, 11.

Murphy's First through Third Claims for Relief were premised on his role as an inmate legal clerk. J.A. 66-67. The Fourth and Fifth Claims for Relief were premised upon Murphy's status as an inmate. J.A. 67. Among other things, Murphy sought a declaration that Disciplinary

Rules 009 and 022 were both vague and overbroad as applied to him. Complaint, ¶¶ 20-21, Prayer for Relief ¶¶ 1-2, J.A. 67. Murphy sought only prospective declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. J.A. 67-68. (Contrary to the Prison's suggestion, Br. for Pet. 14 n.4, Murphy did not seek expungement of his record. *See* J.A. 67-68; *see also Edwards v. Balisok*, 520 U.S. 641 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994).)

Murphy accepts the Prison's description of the proceedings in the United States District Court. The District Court granted summary judgment for the Defendants. (Note, however, that the District Court also found that Murphy did not satisfy the *Sandin v. Conner*, 515 U.S. 472 (1995), requirement that he demonstrate that his restraint exceeded the expected conditions of his sentence. P.A. 24. Because Murphy did not allege a denial of procedural due process to which *Sandin* would apply, the District Court's *Sandin* holding is superfluous.)

The United States Court of Appeals for the Ninth Circuit reversed the District Court and directed entry of summary judgment for Murphy. *Murphy v. Shaw*, 195 F.3d 1121 (CA 9 1999), P.A. 1, 15. The Prison timely petitioned this Court for review.[2]

The Ninth Circuit's decision is premised upon two First Amendment grounds. First, "the letter itself constitutes speech that, outside of the prison context, would

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[2] At the time of the Ninth Circuit's consideration of this case, Murphy was confined at a regional prison in Great Falls, Montana. He is currently confined at a state prison in Shelby, Montana. The Petitioner's belief that he is housed at Montana State Prison in Deer Lodge, Pet. Br., 14 n.4, is mistaken.

doubtless enjoy the protection of the First Amendment." *Murphy*, 195 F.3d at 1125, P.A. 8-9. Second, "the provision of legal assistance . . . is an activity protected by the First Amendment." *Id.*, 195 F.3d at 1126, P.A. 9. The lower court's second conclusion is grounded in context: the Prison had appointed Murphy as an inmate legal clerk and had authorized his legal clerk activity.

The court below cited its earlier decision in *Rizzo v. Dawson*, 778 F.2d 527, 531 (CA 9 1985), in support of its second proposition. *Rizzo* held that, in order to state a claim of retaliation for writ-writing, the prisoner "must also allege that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." *Rizzo*, 778 F.2d at 532.

Thus, the Ninth Circuit's holding is premised upon two First Amendment rights: the right to communicate facts and advice about another's case, regardless of whether the inmate is a legal clerk and, when assistance is permitted by a prison, the right to assist without imposition of sanctions that are addressed to the content of that assistance. Because the Prison neither prohibited inmate-to-inmate correspondence nor prohibited legal clerk assistance to inmates in its Maximum Security Unit, the Ninth Circuit engaged in a straightforward analysis under this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987). The Court of Appeals concluded that the Prison's punishment of Murphy failed to satisfy the *Turner* test.

SUMMARY OF THE ARGUMENT

Montana State Prison inmate Kevin Murphy wrote a letter to inmate Pat Tracy to give him information and advice regarding a defense in Tracy's criminal case. This information disparaged a prison guard, and the Prison punished Murphy for that reason. The question presented is whether a prison may do so.

Whatever we may say about the reasoning of the lower court in resolving this question, its judgment was correct. Murphy should not have been punished for the content of his letter.

1. The right to convey information and advice regarding pending criminal litigation is a "core" First Amendment right. As such, and because it is not lost as a result of conviction of a crime, a prisoner does not lose that right as an incident to confinement.

While a prison has legitimate penological interests that it may assert, regulation of the content of speech that communicates information and advice about pending criminal proceedings and intended for use in those proceedings is not one of those interests. Evaluation of speech communicating facts and advice material to a criminal defense is exclusively a province of the judicial branch and its judges, attorneys, and jurors. A prison has no business preventing the communication of that information merely because it believes it to be false or because it dislikes what it says.

2. The Prison's punishment of Petitioner Murphy fails the *Turner/Abbott* test. Evidence in the record fails to demonstrate any logical connection between the Prison's

articulated interests of preventing inmate-staff confrontation and of ensuring the integrity of its due process proceedings. Murphy was not punished for words spoken to a staff member, but for words written about a staff member and intended to be communicated to an outside attorney.

The Prison's punishment of Murphy for what he said also failed to satisfy the second part of the *Turner* test. The Prison claims that Murphy had other avenues for his speech – that he could have written directly to Tracy's attorney. The Prison, however, punished Murphy for the content of his letter. It did not matter to whom the letter was addressed.

Requiring prisons to refrain from punishing inmates when their letters contain information and advice about legal proceedings outside the prison imposes no burden on prison resources. The Prison claims that it would have to distinguish "legal mail" from non-legal mail and that this would be an impossible task. The Prison raises this claim for the first time in this Court. The Prison fails to point out the obvious. Because it already punishes prohibited inmate speech, and may do so legitimately, its officers engage in the day-to-day function of distinguishing protected from unprotected speech. A holding that protects speech communicating information and advice gives guidance to those officers.

Finally, ready alternatives satisfy the Prison's articulated interests. The Prison claimed that Murphy could have written to Tracy's attorney. If this is true, the corollary must be true. Instead of punishing Murphy for the

content of his letter, the Prison could either have forwarded it to Tracy's attorney or returned it to Murphy with instructions to send it to counsel.

3. If Prisons were permitted to punish prisoners for speech critical of staff, other public interests would be adversely affected. This Court many times has justified prison restrictions on the press and other persons outside the prison because of the relatively unfettered right of correspondence between prisoners and outsiders. Moreover, when the prison regulates or prohibits speech critical of staff that is intended for a courtroom, it harms the integrity of the judicial process. Ironically, the Prison here interfered with a due process hearing when it prevented Tracy from learning information material to his defense to his criminal charges.

4. This case does not affect the other interests articulated by the Prison and the amici. Prisons may inspect and read prisoner mail, including "legal mail." Prisons may prohibit inmates from acting as legal clerks. Prisons may prohibit inmates from conducting investigations and engaging in other associative activities that they feel will affect the order and security of the institution. A holding that a prison may not punish for the content of advice and information regarding a pending criminal case does not create a right of one inmate to meet and counsel with another.

5. Punishing an inmate law clerk for his advice to another inmate implicates the second inmate's right of access to the courts. The right of access consists of two prongs. Under the first, the prison has a duty of non-interference with a prisoner's right to defend against

criminal charges. Under the second, a prison has a duty to ensure that a prisoner may bring post-conviction petitions and challenges to the prisoner's conditions of confinement, matters that are not the subject of Sixth Amendment protection.

Saying that the right of access is satisfied by the appointment of counsel in a criminal case is not the same as saying the prison did not violate its duty of non-interference. A prison may interfere with a prisoner's criminal defense, even if the prisoner has an attorney. That is what occurred in the case at bar.

Murphy, as an inmate legal clerk, has standing to raise this issue. Because Murphy was punished, Tracy did not learn of information material to his defense. Their interests are intertwined and Murphy is in as good, if not a better position, to articulate the right of access. Both suffered injuries but only Murphy was in a position to bring the claim to redress Tracy's.

6. The Prison and the amici invite this Court to rule on the question of whether inmate "legal mail" has the protection of the First Amendment. This question is not at issue in this case, because the Prison permitted correspondence between inmates, whether the correspondence addressed legal matters or not. Contrary to the Prison's claim, *Turner* did not address the question.

If the question were to be addressed in this case, it should be resolved in favor of protecting the communication. This Court may hold simply that a prison must ensure that information material to a criminal defense can reach the accused inmate or her attorney.

Because the Prison had no interest in punishing an inmate for communicating information material to another inmate's criminal defense, this Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. THE PRISON HAD NO LEGITIMATE INTEREST IN CENSORING INFORMATION COMMUNICATED FOR USE IN A PENDING CRIMINAL CASE.

A. Inmates Retain Various First Amendment Rights Including the Right to Communicate Information and Advice About a Pending Criminal Proceeding.

Prisoners do not lose all protection of the Constitution when they enter the prison gate. *Turner*, 482 U.S., at 84. A convicted felon "retains a variety of important rights that the courts must be alert to protect." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). These include "those first amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

This Court has called the communication of information or advice about pending litigation one of the " 'core First Amendment rights'. . . . " *In re Primus*, 436 U.S. 412, 432 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1(1976).) This Court has repeatedly held that giving advice or imparting information relevant to possible or ongoing litigation is speech, as well as association, protected by the First

Amendment to the United States Constitution. *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). The Trainmen, for example, routinely sent a Lodge secretary to injured railroad workers or their survivors to "recommend that the claim not be settled without first seeing a lawyer" and to refer them to a favored lawyer. As to these practices, this Court said, "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them. . . . " *Brotherhood of Railroad Trainmen*, 377 U.S., at 5. The right to communicate such information and advice is protected.

B. The Prison Had No Legitimate Penological Interest in Punishing Respondent's Speech.

The *Primus* line of cases addressed non-prisoner speech. Those cases require the State to show both a compelling interest in speech regulation and to demonstrate that the means chosen to advance that interest are narrowly drawn.

The standards for prisoner speech are different: in prison, when it conflicts with legitimate penological interests, some speech may be prohibited and other speech regulated. Nevertheless, prisoners retain cognizable speech rights. The State must demonstrate that its prohibition or regulation of prisoner speech satisfies the standards of *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989), and *Turner v. Safley*, 482 U.S. 78, 89 (1987). These

cases ask if a prison has any legitimate penological interests to be served by its rules, practices, or actions. *Id.*

In the case at bar the Prison lacked a legitimate penological interest in punishing Murphy for his words. Information and advice relevant to a defense in a criminal case is speech of the highest order. The state has no legitimate interest in suppressing such information. In fact, the opposite is true. More than merely protecting such communication, this Court has, as an incident to due process, compelled it. *See Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam); *Pyle v. Kansas*, 317 U.S. 213, 215-216 (1942); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that state suppression of evidence favorable to the accused deprives the accused of due process of law and that the prosecution, when asked, must communicate mitigating and exculpatory information to the accused). Similarly, the Sixth Amendment ensures that the accused has the opportunity to present evidence in his defense. *Pointer v. Texas*, 380 U.S. 400 (1965); *Taylor v. Illinois*, 484 U.S. 400 (1988). That opportunity is denied when the state interferes with the communication of that information. This Court has thus held that prison regulations or practices that impose substantial burdens on defense counsel "unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts. . . . " *Procunier v. Martinez*, 416 U.S. 396, 419-420 (1974), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

If *receipt* of information and advice relevant to a criminal defense is a constitutional right of the highest order, then giving the same information and advice must be a constitutional right of equal magnitude. *Cf., Virginia*

State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-757 (1976) ("where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both"). The communication of such information is protected even if it is critical of state officials. Speech critical of the exercise of the State's power "lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-35 (1991).

What was the value of the speech in Murphy's letter? Murphy told Tracy that he, Murphy, had also been the victim of Galle's retaliation ("all that happened is that I received two writeups from him myself as retaliation"), a fact which, if proven at trial, would have been relevant to the question of Galle's bias. Murphy also recounted information that he had learned from others in the Prison. ("Galle is an overzealous guard" who "has an agenda to punish and harass inmates"; Galle has made "homosexual advances.") Finally, he imparted some legal advice: "Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time." This is advice akin to "You ought to sue," or, "Your case is worth a lot of money. You ought to get a lawyer."

The Prison punished Murphy for statements critical of a staff member but made to aid in preparation for a criminal trial that would take place outside the prison. The undisputed evidence demonstrated that Murphy did not intend or expect officer Galle, the subject of his report, to see his letter. Murphy's letter was not directed to Galle. Nothing in the record hints that Galle ever saw it or heard of it. If Galle was to be confronted with Murphy's statements, it would be by Tracy's attorney in

the courtroom. The Prison had no legitimate interest in controlling that process.

When the communication is directed to a courtroom, this Court has ensured that it reaches it without state interference. In *Ex parte Hull*, 312 U.S. 546 (1941), the Prison refused to mail a habeas petition pursuant to its regulation that provided for review of "all legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals" to determine if they were "properly drawn." *Ex parte Hull*, 312 U.S., at 548-549. This Court was blunt in its evaluation of the regulation. "Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.*, at 549; *see Bounds v. Smith*, 430 U.S. 817, 834 (1976) (Burger, C.J., dissenting) (stating that the state "may not act in such a manner as to interfere with the individual exercise of . . . federal rights"); *id.*, 430 U.S. at 838 (Rehnquist, J., dissenting) (observing that *Hull* and other "access" cases generally stand for the proposition that the State may not erect a barrier between the prisoner and the courts); *Lewis v. Casey*, 518 U.S. 343, 368 (1996) (Thomas, J., concurring) (pointing out that *Bounds'* predecessors comprise two lines of authority, one of which prohibited "prison regulations that restricted or effectively prohibited inmates from filing habeas corpus petitions or civil rights lawsuits"); *cf., Cochran v. Kansas*, 316 U.S. 255, 257-258 (1942) (holding that prison could not legitimately frustrate efforts to appeal).

The proposition that the Prison had no legitimate interest holds even if we assume that Murphy's statements were false. Determining the truthfulness of the

information proffered by Murphy for use in a court proceeding was a judicial, not a penological, function. Nevertheless, Murphy was punished because (as the charge alleged), "Murphy trie[d] to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of." J.A. 54. Those "certain actions" would have been the introduction of evidence material to Tracy's defense.

Just as this Court ensures that a prisoner's words addressed to a court may be heard, the Courts of Appeals have vigorously asserted the judicial branch's power to determine questions of frivolousness and truthfulness. *See Adams v. James*, 784 F.2d 1077, 1083 (CA 11 1986) (Clark, J., concurring in part) (noting that frivolousness and good faith are concerns of the courts and not the prison administration); *Nolan v. Scafati*, 430 F.2d 548, 551 & n.4 (CA 1 1970) (holding that prison could not refuse to mail an inmate's letter to the Civil Liberties Union because prison believed it contained "lies").

The merit of Murphy's claims would have first been measured by Tracy's defense counsel. Had he found them wanting, that would have been the end of the matter. Had defense counsel found Murphy's claims credible, they would then have been tested by the prosecutor under cross examination and in rebuttal. Finally, the fact-finder in Tracy's case, whether judge or jury, would have made the final determination about the veracity and credibility of Murphy's claims.

If the prosecutor believed any inmate's testimony to be false, the state could bring a perjury charge, again to be resolved by a court of law and not by the Prison. The

court also had the power to impose contempt sanctions on a witness. These are all functions of the judicial branch. The Prison, however, would arrogate these powers to itself.

By stretching its Disciplinary Rules to fit Murphy's letter, Montana State Prison extended its authority into the court room where it has no interest in order and discipline. The Prison conferred upon itself the authority to determine if evidence offered for use at a criminal trial is "true." If the Prison's regulations are given this breadth, prison officials could punish most prisoners' offers to testify on behalf of an inmate and against a staff member. Under its application of Rule 022 (Interference with Due Process Hearings), the Prison may threaten any inmate who volunteers to offer testimony on behalf of another prisoner when that evidence alleges employee misconduct, J.A. 14, 62, or whenever the Prison believes, "There is no evidence of any of the statements in this letter to be fact." J.A. 54, 62. Under its application of Rule 009 (Insolence), the Prison may threaten to punish an inmate for tendering evidence any time it feels the evidence may "intimidate the employee" or "harass or cause alarm in an employee." J.A. 10, 60.

The interests triggered by Murphy's letter were judicial and evidential. The Prison therefore lacked a legitimate interest in punishing Murphy.

The Prison, however, articulates various other interests that are legitimate in the abstract. These should be tested against the facts of this case under a standard *Turner* analysis.

II. THE PRISON'S PUNISHMENT OF MURPHY WAS NOT REASONABLY RELATED TO THE PENOLOGICAL INTERESTS IT ARTICULATES.

A. The *Turner* Test.

When the state articulates legitimate penological interests, *Turner* sets forth the factors that are relevant in determining the reasonableness of its actions. "First, there must be a 'valid rational connection' between the [prison's actions] and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S., at 89. Second, we ask if "there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S., at 90. Third, the courts must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." *Id*. "Finally, the absence of ready alternatives [that accomplish the prison's stated goal] is evidence of the reasonableness of a prison regulation. [citation omitted.] By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id*.

B. There is No Logical Connection Between the Prison's Punishment of Murphy and the Interests it Asserts.

Any "valid, rational connection" between the prison's actions and its asserted penological interest must be supported by competent evidence in the record. *Abbott*, 490 U.S., at 414 n.12; *Turner*, 482 U.S., at 98 (striking down inmate marriage ban, observing, "petitioners

have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing [violent love triangles]"); *cf., Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (even though state's asserted interests in regulating CPAs were "substantial," it had failed to show a connection between those interests and its proposed regulation of CPAs' commercial speech); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-790 (1978) (assertions that corporate speech would drown out other points of view not shown by the record); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580-581 (1971) (record was "devoid of evidence" that supported order enjoining Union's "legal advice" to injured workers); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied").

In this case the Prison did not offer in the lower courts and has not offered in this Court any evidence that demonstrates a connection between its legitimate penological interests and its punishment of Murphy.

1. The Prison had no interest in security and order in this case.

The Prison's interests in security and order were not at issue. Although charged, Murphy was found not guilty of a violation of Disciplinary Rule 025, "Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution." Pet. Br. 11.

This case does not present the question of whether a prison may impose disciplinary punishment based on evidence found in a prisoner's correspondence. Without question, had Murphy outlined an escape plan, had he described a plan to attack another, or had he notified Tracy of the time and place when contraband would be brought in, that kind of statement could be used as evidence to invoke punishment. In that instance Murphy would not have been punished for what he said. He would have been punished for actions that his written words revealed. In this case Murphy was punished for what he said, when those words were not evidence of criminal or other wrongdoing.

2. The Prison did not demonstrate a connection between Murphy's punishment and its interest in regulating speech directed to its staff.

Murphy was charged with and found guilty of violating Rule 009, "Insolence," and Rule 022, "Interference with Due Process Hearings." We consider those offenses in order.

If the Prison's application of Rule 009, "Insolence," is to pass muster, then evidence must demonstrate a logical connection between its application to Murphy's words and the legitimate penological interest invoked to justify it. *Turner*, 482 U.S., at 89-90. The record shows no connection.

This Court has recognized a right to confront and criticize law enforcement officers outside the prison context. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *City*

of Houston v. Hill, 482 U.S. 451 (1987). Murphy recognizes that an inmate's exercise of that right inside a prison in many circumstances would intrude upon the Prison's legitimate interests in order and rehabilitation. As part of its interest in order and rehabilitation, the Prison has a legitimate interest in reducing staff-inmate confrontations. Rules that prohibit insulting or profane remarks directed to a staff member, even if the words may be less offensive than the "fighting words" of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), are permissible in the prison setting. If Murphy had addressed his words directly to Galle, had he shouted them in the Prison yard, then they would have come within the province of the Prison to regulate or punish. *Cf., Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (noting that even religious speech could incite disorder and thereby constitute a breach of the peace).

The Prison may not, however, make the same claim in the case at bar.

In this case Murphy's words were not directed to a Prison employee. They were words about a Prison employee. Even the Prison's Disciplinary Rules (under which Murphy was charged) distinguish words addressed *to* a Prison employee from words ***about*** a Prison employee. Rule 009 notes that "Insolence" applies to "language, writing or gestures directed *to* an employee." Rule 009; J.A. 10 (emphasis supplied). Rule 022 exempts statements critical of employees when they are included in a grievance addressed to Prison administrators. Rule 022, J.A. 14.

Put differently, in the context of this case, the Prison exempts criticism about an employee when it is addressed to Prison administrators, but punishes the same criticism about an employee when it is intended to be addressed to a court. The Prison offered no evidence to explain why one should be exempted and the other punished.

It is undisputed that Murphy did not believe that officer Galle would see his letter. Murphy Aff. ¶ 10, J.A. 88. The Prison offered no evidence that the officer ever saw it. Prison officials have never submitted evidence demonstrating a connection between its penological interest in reducing staff-inmate confrontations and an inmate's communicating information and advice relevant to another prisoner's criminal defense for use in a courtroom, when that information disparages a prison employee.

3. The Prison did not demonstrate a connection between Murphy's punishment and its interest in ensuring the integrity of its due process hearings.

The Prison has an interest in ensuring that its due process hearings are orderly and that the testimony and other evidence submitted in those hearings is accurate. *See* Mahoney Aff., ¶ 4.c, J.A.96 (stating that inspection of mail furthers the Prison's interest in preventing plots to have inmates lie in due process hearings). The Prison, however, has not demonstrated how a letter conveying

information for use in a court proceeding and recommending that an inmate's attorney first review the information affects the Prison's interest in its own proceedings.

4. Because the Sixth Amendment and due process rights of other prisoners are implicated, any evidence the Prison might proffer to demonstrate a connection between its legitimate interests and Murphy's punishment would have to be very probative.

Even if the Prison had proffered the necessary evidence, it would have to be closely related to an articulated interest, for the Prison would be regulating not only the speaking prisoner's First Amendment rights, but also the receiving prisoner's due process rights. *Brady v. Maryland; Pyle v. Kansas; Mooney v. Holohan, supra; cf., Martinez,* 416 U.S., at 408 (both parties to correspondence have free speech interests). This is so because the essence of Murphy's communication was, "don't plead guilty, I have learned and know personally facts about the guard's reputation for treatment of other inmates." This was good advice because, as Murphy pointed out above, Montana admits evidence of the character of the alleged victim to support a claim of self defense. Rules 404(a)(2); 405, Mont. R. Evid.; *Shadwell,* above (prior threats and reputation for violence were admissible).

Had Murphy said, "I think you have a defense under *Shadwell,*" that surely would not have been punishable. But Murphy wrote about the traits themselves. If Murphy had paraphrased *Shadwell* (i.e. "Galle has made threats and has a reputation for violence to inmates"),

that should not make his statement punishable. The statements are fundamentally the same, but the Prison punishes references to character traits under Rule 009. Whether Murphy describes the traits or used the shorthand, "a defense under *Shadwell,*" the uttering of either statement would be subject to sanction by the Prison.

C. If a Prison Punishes Content of Communications, Then Inmates Have No Other Avenues by Which to Communicate Criticism of Prison Staff.

If the inmate has "alternative means of exercising the right" after the avenue complained of is foreclosed, then the prison's actions are not seen as exaggerated. *Turner,* 482 U.S., at 90. Murphy, however, was punished for what he said, not for how he communicated his message. Punishing Murphy for the content of his message cut off all avenues of communication.

A prisoner has only two means of notifying a defendant or his attorney that the prisoner knows facts relevant to the defendant's case. He may speak or he may write. Because the Prison punishes an inmate for the content of the communication, it does not matter how many avenues of communication may be available. Regardless of the avenue, the content of the communication is punished by the Prison.

The Prison contends that the court below applied this *Turner* standard incorrectly when it concluded that nothing in the record showed that Murphy had access to the name and address of Tracy's lawyer. The Prison contends that Murphy could have written to Tracy's lawyer, and

that such a letter would have been permitted. This begs two questions.

First, it does not matter whether Murphy had access to Tracy's attorney or not. Murphy was punished for the content of his letter, without regard to the nature of his addressee. (The letter would not necessarily have been privileged from inspection. *See* Mail Policy ¶ I.B.2, J.A. 35; ¶ VII.A, J.A. 43.) Second, if writing to Tracy's lawyer was the preferred avenue, as the Prison contends, then we must ask two questions. Why did the Prison punish Murphy instead of sending his letter to Tracy's attorney? If that were too great a burden, then why punish instead of returning Murphy's letter to him with instructions to send it to Tracy's attorney? Both methods address the Prison's articulated interests. That the Prison punished Murphy instead of redirecting his letter demonstrates the Prison's "exaggerated response." *Turner*, 482 U.S., at 90.

D. Accommodating the Right to Communicate Advice and Information About a Defense in a Criminal Case Has No Legally Recognizable Impact Upon Staff, Other Inmates, or Prison Resources.

Turner considers the impact of accommodating the inmate's right upon staff, other prisoners, and prison resources. *Turner*, 482 U.S., at 90; *Abbott*, 490 U.S., at 418. Here the Prison contends for the first time that requiring it to distinguish "legal mail" from non-legal mail would

impose "an intolerable burden."[3] The claim is empty because the Prison already engages in that kind of function on a regular basis.

The Prison punishes insolent speech. Rule 009, J.A. 10. It must therefore distinguish between insolent speech and speech that is not insolent (protected speech) as a matter of course. (Anything else would constitute arbitrary punishment, which would violate the due process clauses. *Cf.*, *Sandin v. Conner*, 515 U.S. 472, 487 n.11 (1995) (noting that prisoners retain protection from arbitrary punishment).) The Prison punishes threatening speech. Rule 004, J.A. 9. Inevitably, its hearing officers are called upon to distinguish threatening from non-threatening, protected, speech. The Prison punishes speech that incites a riot or strike, Rule 011, J.A. 11, and presumably does not punish speech that does not incite. It punishes speech that interferes with due process hearings but would not punish speech that does not. More important, prison officials are routinely called upon to distinguish speech that is intended to be a grievance. Rule 022, J.A. 14.

Holding that the Prison may not punish the communication of information and advice material to an inmate's criminal case does not impose a burden. Instead it provides guidance to the prison officials in their day-to-day function of distinguishing permissible speech from impermissible speech.

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[3] This claim was not raised in the courts below. Br. of Appellee 12, *Murphy v. Shaw*, 195 F.3d 1121 (CA 9 1999); Def.'s Resp. to Pl.'s Mot. for Summ. Jmt. and Br. in Supp. of Mot. for Summ. Jmt. 6, *Murphy v. Shaw*, No. CV 95-62-H-CCL (D. Mont. July 8, 1996); C.R. 25.

E. Ready Alternatives Satisfy the Prison's Interests.

As Murphy noted above, the Prison's interest in disciplining "Insolence" appears to be prevention of inmate-staff confrontations. The Prison also has a legitimate interest in rehabilitating inmates. Teaching civility would appear to be related to an interest in furthering rehabilitation.

The alternatives available to the Prison appear in its policies. It punishes words directed **to** instead of **about** staff. *See* Rule 009, J.A. 10 (punishing "abusive language . . . directed to an employee"); Rule 022, J.A. 14 (exempting statements about an employee contained in a grievance). Nothing compels the Prison to show letters like Murphy's to the subjects of those letters. As the court below concluded, the Prison may readily prevent confrontations by shielding its staff from communications about them.[4]

With respect to its interest in rehabilitation, the Prison may impose rules with an eye to ensuring that inmates use acceptable means of resolving grievances and disputes. *Bradley*, 64 F.3d, at 1280. In this case, the

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[4] *Compare Bradley v. Hall*, 64 F.3d 1276, 1281 (CA 9 1995) (distinguishing disparaging remarks about staff from disparaging remarks to staff and finding the former protected); *Loggins v. Delo*, 999 F.2d 364, 376 (CA 8 1993) (same); *Brooks v. Andolina*, 826 F.2d 1266, 1268 (CA 3 1987) (same); *McNamara v. Moody*, 606 F.2d 621, 624 (CA 5 1979) (same), *with*, *Leonard v. Nix*, 55 F.3d 370, 374 (CA 8 1995) (distinguishing disparaging remarks about staff from disparaging remarks to staff and finding the latter unprotected); *Goff v. Dailey*, 991 F.2d 1437 (CA 8 1993) (same).

Prison's discipline of Murphy runs counter to this interest. Participation in the judicial process is an acceptable means of resolving disputes. Officer Galle's character was better addressed in the courtroom than in the prison yard.

The Prison's "Interference with Due Process Rule" furthers a legitimate interest in ensuring the integrity of its due process proceedings. *See* Mahoney Aff., ¶4.c., J.A. 96. This interest is not hindered by protecting speech that communicates information and advice about a proceeding taking place outside the Prison's jurisdiction. Protecting that speech acommodates the Prison's interest. Ironically, the Prison's enforcement of this rule did interfere with a due process hearing. Tracy was denied the opportunity to pursue and present a defense to his charges.

F. Conclusion.

Application of the four *Turner* factors demonstrates that the Prison's punishment of Murphy was not reasonably related to any of the legitimate penological interests that it articulates. The Prison failed to demonstrate a connection between its interest in preventing staff-inmate confrontations and its interest in the integrity of its due process hearings. Punishment of the content of Murphy's speech cut off all avenues of communication. Permitting Murphy's words to pass would have little or no effect on the Prison's staff and other inmates. Ready alternatives, including the redirection of Murphy's letter, demonstrated that the Prison's reaction was exaggerated.

III. PERMITTING PRISONS AND JAILS TO PUNISH INMATES FOR STATEMENTS CRITICAL OF THEIR STAFF AFFECTS OTHER PUBLIC INTERESTS.

A. The Public's Interests in Information About its Jails and Prisons and in the Legitimacy of Criminal Trials Outweighs the Prison's Interest in Suppressing Statements about its Staff.

This Court has repeatedly noted the important function that inmate communications play in the public oversight of jails and prisons. In several cases, this Court recognized the importance of the right of inmates to correspond with the press and relied upon that right to justify limitations on other First Amendment rights. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (upholding prohibition on inspection of jail, stating, "Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions"); *Pell v. Procunier*, 417 U.S. 817, 824, 826 (1974) (upholding prison's limits on face-to-face interviews in light of other alternatives and noting, "One such alternative available to California prison inmates is communication by mail"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 847 (1974) (same, noting, "newsmen and inmates are permitted virtually unlimited written correspondence with each other").

In the case at bar the Prison punished Murphy for the content of his statements. Had Murphy included the same statements in a letter to the press, he would have been subject to the same sanctions. The Prison's view – that it may sanction Murphy for statements that disparage staff – is inconsistent with the *Pell* line of jurisprudence. The Prison would close the most important source that the

public has to learn about conditions in its jails and prisons and the practices of their guards.

This Court has also noted the role of free speech in the public education and petition functions of criminal trials. The primary purpose of a trial is to achieve justice. The trial also educates the public about the issues of the trial. A public trial serves to act as a check against abuse. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 568-569 & n.7 (1980). The public nature of the trial ensures that there is not only fairness but the perception of fairness. *Richmond Newspapers*, 448 U.S., at 570; *In re Oliver*, 333 U.S. 257, 270 (1948). The role of the witness thus goes beyond fair trial guarantees. It carries a free speech component as well.

The right to participate in the trial, a right that goes beyond the accused's right to a fair trial, is an ancient one. " 'There is an invitation, to all persons who can inform the Court concerning the matter to be tried, to come into the court, and they shall be heard.' " VI J. Wigmore, Evidence § 1834, p. 437 (J. Chadbourne Rev. 1976) (quoting *Cornish's Trial*, 11 How. St. Tr. 460 (1690).) This is, as this Court has said, "unbroken, uncontradicted history." *Richmond Newspapers*, 448 U.S., at 573.

> The First Amendment, in conjunction with the Fourteenth . . . share a common core purpose of assuring freedom of communication on matters relating to the function of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal

> trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.

Richmond Newspapers, 448 U.S., at 575.

That is not to say that every witness, much less every inmate-witness, has an unvarnished right to appear at a trial and testify. The trial itself is subject to regulation by the presiding judge. The calling of witnesses and the eliciting of their testimony – and therefore the witness's right to give testimony – is likewise subject to regulation by the court. *See* Rule 104, Fed. R. Evid. And that is the point. The witness's interest in giving testimony should be regulated by the court, not by the Prison through its imposition of punishment.

B. An Accused's Interest in Obtaining Timely Exculpatory Facts Is Greater Now than it Was When *Brady* Was Decided.

In 1963, when *Brady v. Maryland* was decided, a defendant's opportunities to obtain post-conviction relief from a *Brady* violation were less restricted than they are today. No fixed time limit was placed on federal habeas or federal post-conviction petitions, *see* 28 U.S.C. §§ 2254; 2255 (1995), or on most state post-conviction petitions. *See* § 3, Uniform Post-conviction Procedure Act (1966), *in* 11A Uniform Laws Annotated 334 (1995); *In re McNair*, 189 Mont. 321, 615 P.2d 916 (1980).

Times have changed. Both state and federal statutes and court decisions have severely limited the time in which to seek post-conviction relief – even when the state has suppressed exculpatory evidence. *See* Mont. Code

Ann. § 46-21-102(1) (1999) (establishing a one-year statute of limitations); 28 U.S.C. § 2244(d)(1) (1999) (one year); 28 U.S.C. § 2263 (1999) (180 days for capital cases in qualifying states); *but see* 28 U.S.C. § 2244(d)(1)(C) (extending the period for information that could not reasonably have been discovered); 28 U.S.C. § 2263(b)(3)(B) (extending the deadline in capital cases for an additional 30 days for "good cause"). This case illustrates the impact: Tracy's claim that the Prison suppressed facts relevant to his defense is time-barred.

IV. THIS CASE DOES NOT IMPLICATE THE OTHER INTERESTS AND CONCERNS ARTICULATED BY PETITIONER AND THE AMICI.

A. The Prison Conflates This As-Applied Challenge With a Facial Challenge to Its Regulations.

The analysis of the issue in this case should not be undertaken with reference to the power to prohibit correspondence, which this Court ratified in *Turner*, but with reference to *Turner*'s four-part test and its requirement that evidence demonstrate a relationship between the Prison's articulated interest and its punishment of Murphy for the content of his writing. The Prison's analysis is appropriate to a facial challenge to its Rules, but not to a claim that those Rules have been applied to suppress speech. The question is not, "Are the Prison's Rules facially neutral?" Murphy did not challenge the Rules on their face. Instead the question is whether facially-neutral rules have been applied in an unconstitutional manner.

The record shows that the Prison expressly punished Murphy for the content of his letter. Under these facts, the application of these rules must satisfy *Turner*'s standards.

B. Many Matters to Which the Prison and Its Amici Point Are Not at Issue.

1. The Prison may inspect and read inmate-to-inmate mail.

Montana State Prison's Mail Policy has never been at issue in this case. The Policy permitted inmate-to-inmate correspondence and authorized Prison officials to inspect those letters. The Prison's power to inspect letters, whether for escape plans, contraband, or the like, has never been questioned in this case.

The Prison may also sanction inmates when the letters contain such things as contraband or escape plans. In such cases, the Prison is not punishing an inmate for the content of the letter, but for conduct that the content reveals. Murphy did not discuss prohibited conduct; his letter contained no contraband.

2. The Prison may prohibit inmates from holding the position of legal clerks and may prohibit inmates from acting as formal or informal writ-writers.

A rule that protects a prisoner from being punished for the content of his letter when he communicates information material to another inmate's criminal case does not affect the Prison's power to regulate the practice of

"writ-writing" or its power to establish, regulate, or abolish the formal position of inmate legal clerk. *See Johnson v. Avery*, 393 U.S. 483, 489-490 (1969). The Prison is free to tell Murphy that he no longer may assist inmates in the writing of writs: it may abolish the legal clerk position. It did not in this case. To the contrary, it employed Murphy as an inmate legal clerk.

The Prison and the United States accuse the court below of creating a "special right to assist." Their accusation is belied by the facts and the holding of the lower court. The Prison had assigned Murphy the duties of an inmate legal clerk. The Prison did not ban his activity and no ban on his activity was ever at issue. The Prison did not prohibit inmate legal clerks from assisting represented inmates. It did not prohibit Murphy from giving advice to Tracy. Neither was he prohibited from writing to Tracy. The holding of the lower court recognized this. P.A. 7-8.

3. The Prison may prohibit inmates from conducting investigations.

The Prison and its amici imagine inmates as roving paralegals. They exaggerate. Holding that the Prison may not punish an inmate for the content of his letter, when that content is advice and information material to another prisoner's defense in a criminal case, is far different from saying that the first inmate has a right to go forth and investigate. Murphy did look into the charges against Tracy, but the Prison neither prohibited his actions nor sanctioned him for them.

In the future the Prison may reasonably prohibit its inmates from actively looking into charges against another inmate. *See Zemel v. Rusk*, 381 U.S. 1 (1965). The Prison may regulate and prohibit prisoners' efforts to organize, whether for litigation or to act in concert for other purposes. *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119 (1977). It may not, however, prohibit them from reporting to an accused inmate's attorney information that they learned in the lunch line.

4. The Prison may read inmate-to-inmate mail regarding legal matters.

Murphy has never claimed that his letter to Tracy was privileged from inspection. He knew that inmate-to-inmate mail was inspected and read by Prison officials pursuant to the Prison's Mail Policy. Murphy Aff. ¶ 10, J.A. 88. He did not and does not challenge the Prison's power either to inspect or to read his letters to inmates. This case and the holding of the court below do not raise that issue. Prisons may read inmate-to-inmate mail and they may read mail between inmates and inmate law clerks. This case does not change that proposition.

5. A holding that the Prison may not censor information and advice does not create a right to meet and counsel with another inmate.

The Prison and its amici call forth the spectre of inmate legal clerks asserting rights to meet with the

inmates they assist. The absence of this issue is dramatically set forth by the facts. The Prison did prohibit Murphy from visiting Tracy. He obeyed that rule. He did not challenge that rule. As it could before the lower court's decision, the Prison remains free to regulate the means by which information material to another inmate's criminal defense reaches that inmate. The Prison may not, however, suppress the message by punishing the messenger.

6. Conclusion.

A holding that a prison may not sanction a prisoner when he offers information and advice regarding another prisoner's criminal case, does not trigger the hypothetical outcomes proffered by the Prison and the amici.

V. THE IMPOSITION OF DISCIPLINE AGAINST INMATE LEGAL CLERKS FOR THE CONTENT OF THEIR ADVICE DEPRIVES OTHERS OF ACCESS TO THE COURTS.

A. Punishing Inmate Legal Clerks for the Content of Their Advice Constitutes a Deprivation of the Recipient's Right of Access to the Courts.

"Right of access to the courts" is shorthand for two unrelated sets of circumstances. A prison creates the first circumstance when its regulations or practices "unjustifiably obstruct . . . access to the courts. . . . " *Martinez*, 416 U.S., at 419-420; *see Bounds*, 430 U.S., at 834 (Burger, C.J., dissenting). When that happens, "It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims. . . . " *Lewis*, 518 U.S., at 349.

The second circumstance arises coincident to confinement. "[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.' " *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam). This Court's decisions hold that the right to petition for redress is not fully deprived as an incident to confinement. Although prisoners may not be the "litigating engines" that they might be outside the prison wall, they must be given some means by which to seek court review of their convictions or the conditions of their confinement. *Lewis*, 518 U.S., at 315. This second circumstance applies expressly to those litigating activities to which the Sixth Amendment right does not attach: seeking of post-conviction relief and filing of civil rights claims. In the case at bar, however, the Sixth Amendment right did attach to Tracy's defense of criminal charges in the trial court.

The Prison ignores the first circumstance and addresses only the second. It contends that Tracy's right of access was fully satisfied by the state's appointment of counsel to represent him. Saying Tracy had an attorney, however, is not the same as saying the Prison did not interfere.

A prisoner's fundamental right of access to the courts "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970) (three judge court), *aff'd sub nom., Younger v. Gilmore*, 404 U.S. 15 (1971). By its very terms and by the fact

that the "right of access" is premised on more than the right to petition, the right of access overlaps both due process and Sixth Amendment rights.

Although Tracy had an attorney, this did not diminish the Prison's duty not to interfere with his defense. Yet it applied its rules to Murphy and thereby interfered with Tracy's ability to present an arguably meritorious defense to the charge made against him. This is a far greater burden than causing defense counsel to be less efficient, which was found to interfere with the right of access in *Martinez*. *Martinez*, 416 U.S., at 420.

Murphy was the source of information material to Tracy's defense. That the prison trained him to be an inmate legal clerk does not change the analysis. If anything, it enhances the right, for the inmate legal clerk is more likely to recognize the significance of the facts.

B. Murphy Had Standing to Raise the Right of Access.

While Murphy's role of inmate legal clerk is not critical to the resolution of the free speech issue, it is necessary to the access to the courts issue. This Court and Courts of Appeals, when squarely presented with the question, have split on the question of whether an inmate legal clerk has standing to assert the right of access of the prisoner he would assist. Some have held or tacitly concluded that an inmate legal clerk has standing to assert the right of access to the courts. *See Johnson v. Avery*, 393 U.S. 483 (1969) (inmate law clerk asserted the access to court right of the inmates whom he assisted); *Gibbs v. Hopkins*, 10 F.3d 373, 378-79 (CA 6 1993) (holding inmate

law clerk may amend his complaint to allege denial of access to the courts by reason of his punishment); *Buise v. Hudkins*, 584 F.2d 223, 227 (CA 7 1978) (holding that *Johnson* "establishes that [the inmate law clerk] can raise the claims of the other inmates because in *Johnson* only the jailhouse lawyer was a party and the decision rested on the denial of access to the courts for his fellow inmates"). Others reach a different conclusion. *See Smith v. Maschner*, 899 F.2d 940, 950 (CA 10 1990) (recognizing controversy over law clerk's right to assert inmate's right of access).

The question of standing is governed by this Court's reasoning in *Singleton v. Wolff*, 428 U.S. 106, 114-16 (1976): "[T]he relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S., at 115. Nevertheless,

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.

Id., 428 U.S., at 116.

The relationship between Murphy and the inmates he assists is such that he is fully or nearly as effective a proponent of the right of access. When the prison disciplines an inmate legal clerk in a way that burdens the assisted inmate's right of access, the rights of both the

clerk and the person he assists are inextricably intertwined. When the prison disciplines a legal clerk for the content of his advice, it ultimately threatens, both directly and indirectly, those for whom the rule of mutual assistance was primarily intended. *Vaughn v. Trotter*, 516 F. Supp. 886, 893 (M.D. Tenn. 1980). If inmate legal clerks cannot raise access claims under these circumstances, prison officials would be free to prevent inmate access by the simple expediency of punishment and harassment of inmate legal clerks. This would erect a genuine obstacle to the inmate's ability to assert his right of access. Under such conditions, Murphy has standing to assert the right of access of the inmates he assists.

Unlike the abstract notions of access to the courts considered in *Lewis v. Casey*, the Prison officials here engaged in the active practice of punishing an inmate legal clerk because they did not like or because they disagreed with his statements. Murphy was disciplined and Tracy pled guilty without the benefit of Murphy's advice and information. When Prison officials hold out the promise of punishment for communicating certain things to an inmate who an inmate legal clerk is assisting, they ensure, as the Prison observes, Pet. Br. 14 n.4, that those communications will not occur, notwithstanding their importance to a claim to be made by the assisted inmate. This is an actual injury. *Laird v. Tatum*, 408 U.S. 1, 11-13 (1972). Neither Murphy's nor Tracy's injuries were theoretical. Under *Singleton*'s test, Murphy should have standing to assert a right of access to the courts.

C. Conclusion.

Murphy has established a violation of Tracy's right of access to the courts. Murphy, acting in his capacity as an inmate law clerk, attempted to bring a potential defense to Tracy's attention. Murphy's recommendation never reached Tracy, who was then prevented from investigating or raising the defense, and ultimately pled guilty to assault. Tracy Aff. ¶ 12, J.A. 84. Tracy's claim never made it into court. And Murphy, like the inmate in *Johnson v. Avery*, was disciplined for assisting. Murphy Aff., ¶¶ 5-6, J.A. 78.

VI. THE PRISON AND THE AMICI INVITE THIS COURT TO RULE ON THE RIGHT TO CORRESPOND REGARDING LEGAL MATTERS; WERE THIS ISSUE PRESENT IT WOULD BE RESOLVED IN FAVOR OF SUCH A RIGHT.

A. The Right to Correspond Has Not Been Put at Issue by the Facts in this Case.

Because the Prison permitted inmates to correspond with other inmates in its Maximum Security unit (and at other prisons), *see* Mail Policy, ¶ II.B.2, J.A. 36, the question of whether the Prison could properly prohibit letters that communicated facts and advice material to an inmate's criminal defense was not at issue. The Prison and amici, however, argue strenuously for such a prohibition. This Court need not reach that issue, for to do so would be to offer an advisory opinion. Nevertheless, if it is considered, the issue should be resolved in favor of a right to communicate facts material to a defense.

B. *Turner* Did Not Address the Application of Rules Prohibiting Correspondence Regarding Legal Matters.

The Prison goes to great lengths in a failed attempt to demonstrate that this Court, in *Turner*, approved the application of rules so as to prohibit inmate correspondence on legal matters. Pet. Br. 28-30. As the United States has pointed out in its amicus brief, Br. of U.S. 25, this Court upheld "the facial validity of the correspondence regulation," *Turner*, 482 U.S., at 99, which permitted inmate-to-inmate correspondence on legal matters, *id.* at 81, "read petitioner's additional challenge to the District Court's findings to be a claim that the District Court erred in holding that the correspondence regulation had been applied in an arbitrary and capricious manner," and remanded that question to the Court of Appeals. *Id.* at 100.

Permitting direct correspondence with another inmate is but one means of ensuring that facts material to a defense come to the attention of the accused and her attorney. Inmates may, as the Prison has pointed out, correspond directly with the accused's attorney. But this is true only if the inmate knows who and where the attorney is. Otherwise the facts that prove the accused's innocence may never see the inside of the courtroom. This Court should hold then, that when Prison officials act in such a way to prevent communication of material facts to an accused or her attorney, they violate the First and Sixth Amendments and the right of access.

This would call for nothing out of the ordinary. The Federal Bureau of Prisons currently permits inmates to

correspond with each other when they are witnesses or parties in the same legal action. 28 C.F.R. § 540.17. Murphy's letter to Tracy would have satisfied those standards. Articulating a rule that requires prisons and jails to ensure that material facts reach either the inmate or his attorney would do nothing more than carry out *Turner*'s "other avenue" factor. *Turner*, 482 U.S., at 90.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution grant a state prison inmate an independent and free-standing right to assist another state prison inmate with a pending court case even if the State supplies other forms of legal assistance to the prison inmate?

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INTRODUCTION

Respondent's brief brings to mind the adage about exercising care over what one asks for. In the complaint, Respondent sought a broad declaration against Petitioners' "practice of disciplining inmate law clerks based on the content of their advice to other inmates." J.A. 67-68. The Ninth Circuit agreed, holding that, "the provision of legal assistance to fellow inmates" was a specially protected First Amendment right to which the Montana State Prison's discipline policy could have no application. Pet. App. 2; *see also* Pet. App. 9 ("legal activities on behalf of other inmates implicate[s] associational rights protected by the First Amendment"). The Court of Appeals thus fashioned a right that is not limited to "inmate law clerks" but extends to any inmate purporting to give "legal advice."

In his brief, however, Respondent takes a different tack, characterizing this case as an as-applied challenge to the discipline meted out to him for the communication of facts allegedly material to an ongoing criminal proceeding. *See, e.g.*, Br. Resp. at 17, 30. He argues further that his conduct should not have been characterized as "Insolence" under Rule 009 or "Interference with Due Process Hearings" under Rule 022. *Id.* at 20-23. The latter analysis is curious because Respondent argues that communications related to such "material facts" are immune from application of the disciplinary policy. In effect, Respondent merely substitutes his version of a categorical privilege immunizing inmate conduct from otherwise neutral prison disciplinary regulations for the "legal advice" privilege adopted by the Ninth Circuit.

Respondent's discomfort with the Ninth Circuit's "legal advice" privilege is understandable since, while he secured a result favorable to his interests, the decision embodies a rule of law that cannot be justified under this Court's First Amendment speech or associational right decisions. Respondent concedes as much and makes no effort to justify the Court of Appeals' analysis. Br. Resp. at 9 ("[w]hatever we may say about the reasoning of the lower court in resolving [whether the Respondent was disciplined validly], its judgment was correct"). No less unmeritorious, moreover, is his alternative "inmate witness" or "material facts" privilege, suggested for the first time before this Court.

Respondent's access-to-courts analysis is equally problematic. First, contrary to what might be inferred from his argument, the merits of Respondent's access-to-courts claim are not before this Court. The access-to-courts doctrine is instead relevant because the Ninth Circuit's newly-minted First Amendment right upsets the balance this Court has struck in its access-to-courts jurisprudence between the interest of prisons in safe, orderly administration of inmate populations – an undertaking that this Court has recognized to be both difficult and subject to deferential review by courts – and the interest of prisoners to participate in the legal process with respect to a quite limited class of proceedings directly relevant to the validity or conditions of their confinement. Second, a review of Respondent's arguments concerning the doctrine merely underscores how significantly the Ninth Circuit's "legal advice" privilege expands upon this Court's decisions.

ARGUMENT

I. RESPONDENT RAISES NO SUBSTANTIAL BASIS UPON WHICH TO SUSTAIN THE NINTH CIRCUIT'S "LEGAL ADVICE" PRIVILEGE UNDER THE FIRST AMENDMENT.

The Court of Appeals drew its "legal advice" privilege out of the First Amendment through application of the standard enunciated in *Turner v. Safley*, 482 U.S. 78 (1987). Pet. App. 10-11. Respondent, however, makes no attempt to vindicate the First Amendment right created by the Ninth Circuit. Instead, he employs *Turner* to establish that communications from a potential witness related to an ongoing criminal proceeding are immune from the Prison's disciplinary policy. Br. Resp. at 18-27. This is a new theory, wholly unrelated to that advanced in the complaint, but it suffers from precisely the same flaws as the Ninth Circuit's opinion.

1. Respondent begins his substantive analysis with a discussion of First Amendment decisions, including *In re Primus*, 436 U.S. 412 (1976), and *NAACP v. Button*, 371 U.S. 415 (1963), concerned with speech or associational activities in connection with litigation. Br. Resp. at 12-13. These decisions, as he immediately acknowledges, have no relevance to the outcome here because they arose in a non-prison context. *See also* Br. Pet'rs at 37 n.10 (distinguishing inmate and non-inmate access-to-courts decisions). Where prisons and prisoners are involved, this Court applies a multi-factor reasonableness standard aimed at resolving the question whether the challenged *regulation* "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Indeed, in *Jones v. North*

Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977), this Court rejected a challenge to prison regulations based on the free speech and associational rights components of the First Amendment to hold that, "an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system' ". *Id.* at 129. Respondent freely admits the facial validity of Rules 009 and 022, i.e., the Montana disciplinary regulations, under which he was sanctioned. ["Murphy did not challenge the Rules on their face"]. Br. Resp. 30. There is consequently no dispute that those rules, including Rules 009 and 022, satisfy *Turner*'s reasonableness standard.

Implicit in Respondent's admission is the recognition that, to the extent any statement in the letter to Tracy constituted "insolence" or an "interference with a due process hearing," they would be cause for discipline as an ordinary matter. Respondent argues at length that nothing in the letter met the elements of the offenses specified in Rules 009 and 022 (Br. Resp. at 20-22), but those arguments beg the more critical question presented by Respondents' Complaint and presented to this Court of whether, even if the statements in the Tracy letter concededly violated the rules, the disciplinary policy could be applied. That is the question the Ninth Circuit answered in its *Turner* discussion and Respondent assiduously avoids in his corresponding treatment of *Turner*. Petitioners' analysis under *Turner* with respect to the issue that was decided below – whether "legal advice" is immune from the disciplinary policy's application – thus stands unrebutted. *See* Br. Petr's at 28-36.

On a related point, Petitioners disagree with amicus curiae United States' suggestion that, should the Court of Appeals' determination concerning the special First Amendment status of "legal advice" be reversed, reweighing under the *Turner* standards would be appropriate. Br. United States Amicus Curiae at 29-30. Given Respondent's repeated acquiescence in the facial legitimacy of Rules 009 and 022 for *Turner* purposes, First Amendment concerns dissipate once the Ninth Circuit's "legal advice" privilege is removed from consideration. That is, because Rules 009 and 022 admittedly contain "neutral" standards of the type required by *Turner* and subsequent precedent, the rules can be applied to inmate speech without First Amendment embarrassment so long as such application is consistent with their terms. *See Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989) ("[w]here, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*").

The United States' reliance on the remand order in *Thornburgh* that application of the facially sustained rule to the publications at issue be considered does not mandate, in Petitioners' view, individualized reweighing under the *Turner* standards. The very objective of prison rules is to establish measures of permissible conduct, and, once those measures have been found or admitted to be constitutionally valid under the *Turner* standards, ad hoc reweighing would be superfluous absent, as here, some claimed exception to the obligation to comply at all with a particular rule. *See O'Lone v. Estate of Shabazz*, 482 U.S.

342 (1987) (challenge by prisoners of Islamic religion to comply with rule restricting return to main prison building during work gang shifts). As discussed *infra*, Respondent has not pursued a due process claim predicated on the absence of a sufficient factual basis for Petitioner Bearley's and Mahoney's determinations. Reconsideration of the propriety of his discipline on remand under the *Turner* standards is therefore unnecessary.

2. Respondent nonetheless advances various contentions during his discussion of the *Turner* considerations that merit comment. *First*, in arguing the absence of any legitimate penological interest in sanctioning him because of statements in the Tracy letter, Respondent states that, "[b]y stretching its Disciplinary Rules to fit Murphy's letter, Montana State Prison extended its authority into the court room where it has no interest in order and discipline." Br. Resp. at 17. "The interests triggered by [his] letter," Respondent adds, "were judicial and evidential." *Id.* at 18. However, the penological interest underlying the disciplinary rules is preventing and, if appropriate, punishing prison conduct deemed inimical to institutional order and safety. J.A. 6 ["Inmate Disciplinary Policy," "Objective: To provide a means of maintaining discipline and enforcing necessary rules within the institution."]. Respondent's position thus proves far too much, since even admittedly *false* statements of fact related to a pending or anticipated judicial proceeding would fall outside the Prison's ability to discipline – a conclusion he readily endorses – because conduct that violated those rules would be immune from punishment if it could be characterized (even falsely) as "legal advice." Br. Resp. at 16 ("[d]etermining the truthfulness

of the information proffered by Murphy for use in a court proceeding was a judicial, not a penological, function"). It further means that his later discussion directed to whether he violated Rules 009 and 022 is as immaterial under his theory as it is under the Ninth Circuit's. In any event, Respondent's remarkable assertion cannot be squared with this Court's repeated admonition that " 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.' " *Turner*, 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 128).

Respondent's related argument that his letter to Tracy implicates "[t]he right to participate in the [latter's] trial" (Br. Resp. at 28) and that, therefore, "[t]he witness's interest in giving testimony should be regulated by the court, not by the Prison through its imposition of punishment" (*Id.* at 29) is similarly flawed. Even if one indulges the generous assumption that Respondent had anything material to Tracy's prosecution to testify about, since nothing in the record below suggested that any of the factual allegations in the letter were relevant to Tracy's defense, no decisional support exists for the proposition that prison administrators are precluded from initiating disciplinary proceedings based on neutral rules of conduct merely because those proceedings relate to statements of alleged fact by a potential inmate witness.[1]

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[1] Under Montana law, for example, "the accused must first lay a foundation that he acted in self-defense before he can introduce evidence of the character of the victim." *State v. Cartwright*, 650 P.2d 758, 764 (Mont. 1982). Nothing in the record remotely suggests that Tracy acted in self-defense. *See* Mont. Code Ann. § 45-3-102 (1999) (specifying when use of force in defense of person is permitted).

Indeed, accepting Respondent's position would substitute in practical effect a categorical "inmate witness" immunity from prison discipline for the Ninth Circuit's categorical "legal advice" privilege. The scope of the "inmate witness" privilege proposed by Respondent, moreover, may be even broader than protecting communications from potential witnesses, since he argues at the conclusion of his brief that "[t]his Court should hold . . . that when Prison officials act . . . to prevent communication of material facts to an accused or her attorney, they violate the First and Sixth Amendments and the right of access." *Id.* at 38. Persons other than potential witnesses presumably may have knowledge of "material facts." It thus might be more accurate to describe Respondent's alternative to the Ninth Circuit's holding as the "material facts" privilege. However characterized, it is no more justifiable under controlling First Amendment speech or right-of-association principles than the Ninth Circuit's "legal advice" privilege.[2]

Second, Respondent's parsing of Rules 009 and 022 to establish his claimed innocence of their violation (Br. Resp. at 20-23) is immaterial not only because he sees no legitimate penological interest implicated by any inmate-to-inmate communications concerning judicial proceedings but also because he did not challenge the sufficiency

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[2] Although Respondent makes his *Turner*-based argument with reference to the redefined privilege, the outcome here is unaffected by whether the "inmate witness" or "material facts" privilege is used in lieu of the Ninth Circuit's "legal advice" privilege. The Prison's penological interest is the same as to both, as are the most significant considerations with respect to application of the four *Turner* factors.

of the evidence supporting the Prison's determinations. *See Superintendent v. Hill*, 472 U.S. 445 (1985). His district court complaint thus sought declaratory relief under the Due Process Clause only with respect to the rules' alleged vagueness (J.A. 67), and none of the lower courts' decisions identified a due process claim directed to evidentiary sufficiency as an issue. Respondent thus abandoned any such claim.

Third, the contention that Respondent had no alternative means of conveying the information in the Tracy letter or, presumably, "legal advice" generally, without fear of sanctions is speculative and wrong. Br. Resp. at 23-24; *see also id.* at 27 ("[h]ad Murphy included the same statements in a letter to the press, he would have been subject to the same sanctions"). If he had sent the letter to Tracy's attorney or to other persons outside the Prison, it would not have been opened. MSP 16-001, §§ I.B.2, II.B.4 (J.A. 35, 36).[3] Finally, as Respondent admits (Br. Resp. at 21), nothing precludes a prisoner from complaining about a correctional officer's conduct through the medium of a grievance. MSP Policy 15-001, Procedures § B, Rule 022 (J.A. 14).

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[3] Moreover, a more stringent standard of review exists as to whether the disciplinary rule policy may be applied to outgoing correspondence regardless of its content. *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974); *see Thornburgh*, 490 U.S. at 413 ("[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials").

Fourth, that prison employees review inmate-to-inmate mail [4] and, as here, may initiate disciplinary proceedings based on matters discussed in the correspondence does not mean, as Respondent supposes, that determining whether a particular letter contains "advice material to an inmate's criminal case" will not impose any additional burden. Resp. Br. at 25. Petitioners discussed in their opening brief the difficulties that may attend distinguishing "legal advice" from other types of content. Br. Petr's at 33-35. Respondent is hardly clear himself on this issue, characterizing the letter to Tracy in the opposition to the petition as "witness language, not lawyer language" (Br. Opp'n Pet. Writ Cert. at 4) and then arguing in his merits brief that the letter "attempted to bring a potential defense to Tracy's attention" (Br. Resp. at 36). Indeed, under Respondent's view, prison officials would be prohibited from evaluating whether a prisoner's bald claim that a letter contained "legal advice" was false because, according to Respondent, such determinations are "judicial" not "penological." (Br. Resp. at 16). Given the uncertain line that separates legal from non-legal speech, much less "material" from "immaterial" speech related to a legal proceeding, Respondent has not carried his burden of showing that the need to cull out "legal advice" will impose no more than a de minimis burden. *See Turner*, 482 U.S. at 93.

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[4] The Respondent and Amici for Respondent mischaracterize the Prison's policy as permitting inmate correspondence between all inmates generally. The evidence in the record demonstrates that only inmate law clerks, not all inmates, are permitted to correspond with inmates in the Maximum Security Unit. (J.A., p. 87).

II. RESPONDENT'S ACCESS-TO-COURTS ANALYSIS MERELY REINFORCES THE CONCLUSION THAT, IF ACCEPTED, THE NINTH CIRCUIT'S FIRST AMENDMENT-BASED "LEGAL ADVICE" PRIVILEGE WOULD OVERRIDE THE BALANCE STRUCK BY THIS COURT BETWEEN PRISON AND PRISONER INTERESTS.

The Ninth Circuit did not reach Respondent's access-to-courts claim. Pet. App. 15. Petitioners nonetheless viewed that doctrine's scope as germane to resolving the question whether the lower court erred in creating a freestanding "legal advice" right under the First Amendment. Br. Petr's at 41-45; *see also* Br. United States Amicus Curiae at 15-19; Amicus Curiae Br. States Florida et al. at 4-6; Br. Amicus Curiae Crim. Justice Legal Found. at 5-8. The doctrine's relevance additionally was discussed in the petition. Pet. Writ Cert. at 18-19.

That said, the actual merits of Respondent's access-to-court claim are not before this Court because that issue is not encompassed within the question presented. Petitioners therefore treat his arguments as addressed to whether the Ninth Circuit's "legal advice" privilege expands the access-to-courts doctrine presently marked out by this Court and thereby serves to interfere with that doctrine's attempt to balance the interest possessed by prison administrators in institutional order and security and the interest of the incarcerated in contesting their incarceration or the conditions attendant to it. Whether the doctrine *should* be expanded must be left for another day when the merits of Respondent's or a similarly-

situated inmate's access-to-courts claim are before the Court.

Respondent's arguments regarding the access-to-courts doctrine is contrary to controlling precedent. He contends that the term "right of access to the courts" constitutes "a shorthand for two unrelated sets of circumstances" with corresponding duties. Br. Resp. at 33. The first of these "sets of circumstances" imposes on prison administrators "a duty of non-interference with a prisoner's right to defend against criminal charges," while the second requires them "to ensure that a prisoner may bring post-conviction relief petitions and challenges to the prisoner's conditions of confinement." *Id.* at 11. Respondent's discipline is alleged to have violated the first duty. *Id.* at 34. Such a reconfiguration of the access-to-courts doctrine cannot be squared with this Court's decisions.

Respondent cites no apposite authority either for his proposed bifurcation of the access-to-courts doctrine into two "prongs" (Br. Resp. at 11) or for the more general notion that, in a penal incarceration context, it extends beyond providing "tools . . . inmates need to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Indeed, the Court in *Casey* held that the "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.* at 355.

Respondent's reliance on *Procunier v. Martinez, supra*, for the first of those prongs is plainly mistaken. That case was concerned with, in relevant part, a ban on the use of

law students and paraprofessionals to conduct client interviews on behalf of attorneys representing inmates. 416 U.S. at 419. This Court concluded that the prohibition "inhibited adequate professional representation of indigent clients" and was not otherwise justified under the "necessary to the furtherance of an important or substantial governmental interest" standard of review established in that decision and subsequently revisited in *Turner* and *Thornburgh*. *Martinez*, 416 U.S. at 420. As discussed in Petitioners' principal brief and reiterated in Part I above, the Ninth Circuit's "legal advice" privilege does not withstand scrutiny under the *Turner* standards. Respondent's suggestion that *Martinez* supports extending the access-to-courts doctrine to ongoing criminal prosecutions against prisoners represented by counsel also fails to account for the Court's statement there that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights." *Id.* at 419. *Martinez* thus is consistent with *Lewis* and *Bounds v. Smith*, 430 U.S. 817 (1977), as to the doctrine's reach. Under the most straightforward of linguistic analyses, a prisoner who has been summoned into court for the purpose of defending against criminal charges can hardly argue that he is being denied *access* to the courts.[5]

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[5] No less unavailing is Respondent's reliance on *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970) (per curiam), *aff'd per curiam*, 404 U.S. 15 (1971). Br. Resp. at 34. *Gilmore* involved a claim that the California Department of Corrections failed to provide adequate "access to law books, legal materials, and lay

Lastly, Respondent's discussion of standing to maintain an access-to-courts claim is notable for its introductory statement that his status, or "role," as an inmate legal clerk, while "not critical to the resolution of the free speech issue, . . . is necessary to the access to the courts issue."[6] Br. Resp. at 34. If that assertion is accepted for argument purposes, it concedes Petitioners' position that the Ninth Circuit's decision, aside from enlarging the reach of the access-to-courts doctrine beyond challenges to existing sentences and confinement conditions, increased the class of prisoners who can assert claims under the court's new constitutional rule since the "legal advice" privilege is not restricted to inmate legal clerks.

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assistance in preparing prisoner writs and complaints." *Id.* at 107. To the extent the district court there construed the access-to-courts doctrine as including "all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him," it associated the right in a criminal proceeding with appointment of counsel. *Id.* at 110. Tracy, of course, had counsel. This Court in *Bounds* referred to its summary affirmance of *Gilmore* but did not suggest that the access-to-courts right it applied extended to proceedings other than challenges to existing sentences or conditions of confinement. *Bounds*, 430 U.S. at 828-29.

[6] Contrary to Respondent's argument that interests of law clerks and their "clients" are coterminous, Br. Resp. 35, this Court has recognized that the interests of inmate "law clerks" and the inmates that they purportedly serve can diverge widely. *See, Johnson v. Avery*, 393 U.S. 483 (1969) [noting that jailhouse lawyers "are sometimes a menace to prison discipline"]; *Id.* at 488 ["Codes of ethics, champerty, and maintenance, frequently have little meaning to a jailhouse lawyer, who solicits business as vigorously as he can." (White, J., with Black, J., dissenting)]; *Id.* at 500.

The same must be said about Respondent's "inmate witness" or "material facts" privilege. Beyond this fundamental difficulty with Respondent's standing argument lies the unique factual circumstances here – i.e., his attempt to assert what he admits is "the assisted inmate's right of access" (*id.* at 35) when Tracy had an appointed counsel who labored under a Sixth Amendment-based duty to provide effective representation. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Hanson*, 940 P.2d 1161, 1172-73 (Mont. 1997). Not only must it be presumed, in the absence of a contrary showing below, that Tracy's attorney conducted a reasonable investigation before his client entered into a plea agreement, but there was also no indication that Tracy, once informed of the letter's content, deemed it appropriate to initiate postconviction proceedings under Montana law alleging either a violation of the prosecution's obligation to disclose exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), or ineffective assistance of counsel. *See* Mont. Code Ann. § 46-21-101 to -203 (1995).[7] Respondent's contention that he is a proper party to advance Tracy's alleged right of access to the courts – which Respondent urges arises in part under the Sixth Amendment (Br. Resp. at 34) – when Tracy has elected

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[7] At the time this controversy arose, Montana law required postconviction relief proceedings to be initiated within five years of conviction. Mont. Code Ann. § 46-21-103 (1995). Tracy's affidavit in the proceeding below indicates that he received a copy of the February 1995 letter in June 1996. Aff. Pat Tracy ¶ 11 (J.A. 84). Respondent's apparent suggestion that Tracy's ability to challenge the conviction arising from his plea agreement was affected in some fashion by Petitioners' conduct is thus groundless. *See* Br. Resp. at 29.

not to do so himself is fraught with difficulty that his brief fails to address. That difficulty, however, is absent from the "legal advice" privilege because the First Amendment right lying at its core is shared by both Respondent and Tracy.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 99-1613

In the Supreme Court of the United States

NOV 13, 2000

ROBERT SHAW, ET AL., PETITIONERS

v.

KEVIN MURPHY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the court of appeals erred in holding that respondent's conduct was protected by a First Amendment right of prison inmates to provide legal assistance to other inmates.

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The question presented in this case is whether a prison inmate has a First Amendment right to provide assistance with pending criminal charges to another inmate who is represented by appointed defense counsel. The United States has a substantial interest in the resolution of that question. First, the Federal Bureau of Prisons (BOP) operates more than 90 penal institutions across the country, and has adopted regulations governing inmate legal activities, see 28 C.F.R. 543.10-543.16, and inmate correspondence on legal and other matters, see 28 C.F.R. 540.10-540.25.[1] The Court's

[1] For example, BOP regulations permit inmates to provide legal assistance to other inmates in the same institution, but provide that "[t]he Warden at any institution may impose limita-

decision in this case could bear on the constitutionality of those provisions or their enforcement, and affect the ability of BOP to advance legitimate penological interests by regulating such inmate activities. Second, the Attorney General is charged with protecting the constitutional rights of prisoners under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* The Court's decision in this case could affect that interest as well.

STATEMENT

1. This case arises from a state prison inmate's effort to communicate with a fellow inmate about criminal charges pending against the latter. In 1995, respondent was incarcerated at the Montana State Prison in Deer Lodge, Montana, where he was confined in the high security compound. As part of a prison program, respondent was trained as an "inmate law clerk" and, in that capacity, provided assistance with various matters to other inmates, including inmate Pat Tracy. In early 1995, respondent learned that Tracy had been charged by state authorities with the felony assault of a prison guard, Officer Glen Galle. The State had appointed a lawyer to represent Tracy, and prison authorities had

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tions on an inmate's assistance to another inmate in the interest of institution security, good order, or discipline." 28 C.F.R. 543.11(f)(1) and (4). Correspondence between inmates at the same institution may be restricted with respect to inmates placed in segregation or presenting security risks. 28 C.F.R. 540.15, 540.16. Correspondence between inmates at separate institutions is not allowed unless inmates are immediate family members or witnesses or parties in the same legal action. 28 C.F.R. 540.17. Incoming correspondence from courts or attorneys is treated as "special mail" and may be inspected but generally is not read or copied by prison officials; outgoing special mail from inmates to courts or attorneys is labeled as such and neither screened nor opened by prison officials. See 28 C.F.R. 540.18, 540.19.

transferred him to the prison's maximum security unit while the charges were pending. See Pet. App. 2-3, 19, 46.

Tracy requested respondent's assistance in defending against the charges. Pet. App. 3, 49. Prison officials denied that request because prison policy prohibited high security inmates, including respondent, from meeting with maximum security inmates, including Tracy. *Id.* at 3, 19. Prison officials sent a low security inmate law clerk to confer with Tracy, but Tracy declined to meet with him. *Id.* at 49. Respondent learned that Tracy had requested his assistance and began his own investigation into the altercation with Officer Galle. *Id.* at 3. On February 16, 1995, respondent sent Tracy the following letter:

> Dear Pat:
>
> How ya doing? I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. [T]he lowside clerks go up there now. [T]hat's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass [*sic*] inmates. He has made homosexual advances toward certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am

filing a suit with everyone in Close I and II named against him. So you can use that too!

Another poiont is [*sic*] that he grabbed you from behind. You tell your lawyer to get ahold [*sic*] of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.

Later. . . .

Murph

Id. at 46-47 (bracketed material in original).

The letter was intercepted in accordance with prison policy and read by petitioner Robert Shaw, an officer in the maximum security unit. Pet. App. 4.[2] On the basis of this letter, Shaw reported respondent for violations of three rules contained in the Inmate Disciplinary Policy (J.A. 6-33): "Insolence" (Rule 009); "Interference with Due Process Hearings" (Rule 022); and "Conduct Which Disrupts or Interferes with the Security or

[2] Under the prison's Inmate Correspondence Policy (J.A. 34-51), "[m]ail from other correctional facilities and mail to prisoners in Maximum Security and Administrative Segregation may be read." J.A. 46; see J.A. 97. This policy sets forth special provisions governing "privileged correspondence" with "licensed attorneys" and certain public officials. J.A. 34-36. But correspondence with "inmate law clerks" is not subject to those provisions. See J.A. 97.

Orderly Operation of the Institution" (Rule 025).[3] In his report, Shaw stated that the letter "accused CO Galle of being an over zealous guard who punishes and harasses inmates for a personal pleasure"; "accused CO Galle of making homo-sexual advances towards inmates"; and stated "that CO Galle retaliated against [respondent] by writing him up." J.A. 52. Shaw also reported that the letter "trie[d] to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which [respondent] is no part of," and that "[t]here is no evidence of any of the statements in th[e] letter to be fact." J.A. 54.

Following a hearing, respondent was found guilty of violating Rules 009 and 022 (but not Rule 025), and given a suspended sentence of 10 days' detention along with three reclassification points. Pet. App. 4. The Rule 009 violation was based on a finding that the letter states that "c/o Galle retaliated against inmate Murphy," and that this "statement indicates unprofessional actions which stand to intimidate the employee." J.A. 60. The Rule 022 violation was based on a finding that the statement in the letter "referring to c/o Galle making homo sexual advances to another inmate would result in disciplinary action against [the] stated em-

[3] The prison's rules are set forth at J.A. 10, 14, and 15, along with other provisions of the Inmate Disciplinary Policy. BOP's inmate disciplinary policy is set forth at 28 C.F.R. Pt. 541. Under that policy, inmates may be disciplined for similar misconduct, including "[i]nsolence towards a staff member" (Code 312); "[l]ying or providing a false statement to a staff member" (Code 313); "[u]sing abusive or obscene language" (Code 404); "[u]nauthorized use of mail" (Code 406); and "[c]onduct which disrupts or interferes with the security or orderly running of the institution" (Code 499). 28 C.F.R. 541.13 (Table 3).

ployee." J.A. 62. Respondent's administrative appeal was denied. Pet. App. 4-5, 21.[4]

2. a. In October 1995, respondent filed this class action in the District Court for the District of Montana, seeking declaratory and injunctive relief pursuant to 42 U.S.C. 1983. The complaint alleged that the actions of the named prison officials (petitioners here) in disciplining respondent in connection with the February 16, 1995, letter violated respondent's First Amendment rights, including the right "to provide legal assistance to other inmates"; abridged "the rights of inmates to access the courts by denying them the assistance of an inmate law clerk"; and violated due process on the ground that the regulations on which the disciplinary action was based are unduly vague or overbroad. J.A. 66-67. Respondent styled the suit as a class action on behalf of "all current and future inmates who may rely on inmate law clerks or 'jailhouse lawyers,'" and all inmates who rely on such "inmate law clerks or 'jailhouse lawyers.'" Pet. App. 43 (quoting Pl.'s Mot. to Certify Class).

b. Following discovery, the parties filed cross-motions for summary judgment. The magistrate judge (Pet. App. 28-44) recommended summary judgment for petitioners with respect to respondent's "access to the courts" claim, explaining that, by communicating with Tracy, respondent "was not attempting to pursue any legal claims or defenses on his own behalf." *Id.* at 37. But the magistrate judge recommended denial of summary judgment with respect to the remaining claims, finding that material disputed facts existed as to whether petitioners' actions were "rationally related to

[4] Tracy did not receive a copy of respondent's letter until June 1996, by which time he had pleaded guilty to the felony assault charges. Pet. App. 49.

a legitimate penological interest," in accordance with the inquiry established by *Turner* v. *Safley*, 482 U.S. 78 (1987), for reviewing constitutional challenges to prison regulation. Pet. App. 38; see *id.* at 37-40. The magistrate judge further recommended denial of class certification. *Id.* at 43-44.

c. The district court (Pet. App. 25-26) granted summary judgment in its entirety for petitioners and ordered that the case be dismissed. With respect to the First Amendment claim, the court first found that "[respondent] was not acting as an inmate law clerk when he wrote and sent the February 16, 1995, letter to inmate Pat Tracy," and that respondent's claims accordingly "must be analyzed without consideration of any privilege that law clerk status might provide." *Id.* at 23-24. The court then held that respondent's First Amendment claim failed under the "test of *Turner* v. *Safley*," "find[ing] that there is a valid, rational connection between the prison inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation." *Id.* at 25. The court further held that "[respondent's] First Amendment right to assist other inmates is, in this instance, inconsistent with his status as a prisoner and with the legitimate penological objectives of [the prison]." *Id.* at 24-25.

3. The Ninth Circuit reversed. Pet. App. 1-17. The court of appeals premised its analysis on the proposition that "inmates have a First Amendment right to assist other inmates with their legal claims." *Id.* at 6 (citing *Rizzo* v. *Dawson*, 778 F.2d 527, 531 (9th Cir. 1985)). The court next concluded that the "undisputed facts" concerning respondent's training as an inmate law clerk and his prior efforts to assist Tracy in that capacity "are enough to raise th[is] First Amendment right," and that "the Prison's decision to discipline [respondent] * * *

undoubtedly interferes with that right." *Id.* at 8, 9.[5] Finally, applying the *Turner* v. *Safley* inquiry, the court of appeals held that petitioners violated this First Amendment right in disciplining respondent, because their actions were an "'exaggerated response' to the Prison's interest in security and order." *Id.* at 15.

In applying *Turner*, the court of appeals acknowledged that "as a general matter" the regulations pursuant to which respondent was disciplined are rationally related to the prison's legitimate penological interests in promoting "security and order," and therefore might pass muster "as applied to inmate correspondence generally." Pet. App. 11. But the court reasoned that the regulations must be scrutinized "as applied to legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising," and held that when viewed from the perspective of this "particular category of protected expression," the regulations were an "exaggerated response" to the stated penological concerns. *Id.* at 11-13. According to the court, "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential legal matter," whereas the inmate's "First Amendment right

[5] In his brief in opposition (at 5), respondent argued that he was not acting in his capacity as an "inmate law clerk" when he sent his letter. This argument is contradicted by respondent's prior statements, see Br. in Opp. App. 2 ("On or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges pending against him."); accord J.A. 75, 78, as well as the allegations set forth in his Complaint (¶ 13), J.A. 65. In any event, for the reasons explained below, we agree that whether respondent in fact was attempting to provide legal assistance to Tracy is "immaterial" (Br. in Opp. 5) to the resolution of his First Amendment claim.

to provide legal assistance to fellow inmates" is squarely implicated by such communications. *Id.* at 12.

The court of appeals remanded for the entry of summary judgment in favor of respondent, and for crafting of "an appropriate remedy." Pet. App. 17.[6]

SUMMARY OF ARGUMENT

One of the consequences of lawful incarceration is the loss of those First Amendment freedoms that are inconsistent with an individual's status as a prisoner and the legitimate penological objectives of the State. Inmates retain free speech rights, but prison regulation of inmate expression satisfies First Amendment review if it is "'reasonably related' to legitimate penological objectives," and "is not an 'exaggerated response' to those concerns." *Turner* v. *Safley*, 482 U.S. 78, 87 (1987). The court of appeals erred in holding that because respondent's letter contained an offer of legal assistance, it implicated not only the general right of free speech, but also a special First Amendment right to provide legal assistance to other inmates. That holding finds no support in precedent or principle, and should be rejected.

When inmates have no reasonable alternative to legal assistance from other inmates to gain access to the courts, a State may not prohibit inmates from providing such assistance. *Johnson* v. *Avery*, 393 U.S. 483 (1969). But even in that circumstance, this Court has recognized only a right of inmates to receive available legal

[6] The court of appeals did not reach respondent's "'right of access to the courts' arguments." Pet. App. 15. The court reached and rejected respondent's due process challenge, concluding that "[w]hile clearer language could be imagined, the challenged regulations are the sort that every prison enforces in order to maintain order." *Id.* at 16. Neither the "right of access" nor the due process claim is before this Court. See Pet. i.

assistance, and not a right of inmates to *dispense* such assistance. Such a right would be especially unwarranted where, as here, an inmate is attempting to assist an inmate who is represented by appointed counsel. Likewise, this Court has recognized that the State may not interfere with an inmate's right of access to the courts by, for example, precluding access to law libraries or otherwise closing the door to judicial review. *E.g.*, *Bounds* v. *Smith*, 430 U.S. 817 (1977). But *Bounds* does not create "an abstract, freestanding right to * * * legal assistance"; rather, it establishes a "right of *access to the courts.*" *Lewis* v. *Casey*, 518 U.S. 343, 350 (1996).

Outside the prison context, the Court has held that individuals enjoy a First Amendment right to associate with others for legitimate common goals and to use litigation to advance those goals. *E.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963). But introducing that principle to the prison context would be inconsistent with the dictates of prison life. In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125-126 (1977), this Court recognized that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls." In light of that fact, *Jones* held that inmates do not enjoy a First Amendment right to engage in union activities, even though such conduct lies within the heartland of protected First Amendment activity outside the prison walls. For similar reasons, the diminishment of "litigating capacity," especially the capacity to litigate on behalf of others, "is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Casey*, 518 U.S. at 355.

As this Court has often recognized, prisons are populated by dangerous individuals with a demonstrated proclivity for anti-social behavior. When such individuals attempt to confer with one another, regardless of their stated purpose for doing so, legitimate penological concerns are implicated. The practice of "jailhouse lawyering" presents particular concerns. Inmates may use legal assistance to gain influence over other inmates, and for other means of self-aggrandizement, profit, or power. In addition, inmate-to-inmate correspondence on legal matters, as on other matters, can be used to pass contraband, form escape plans, develop or sustain gangs or other informal organizations, or threaten institutional security and safety in other ways. Holding that inmate legal assistance activities are entitled to special constitutional protection under the First Amendment would seriously undermine the ability of prison officials to address such concerns.

While respondent's conduct was not protected by a First Amendment right to dispense legal assistance, it does implicate the general right to free speech. *Turner* v. *Safley* supplies the standard for determining whether an inmate's free speech rights are violated in this context. Inmate correspondence may be restricted if prison officials establish that such regulation is "reasonably related" to valid penological objectives, and is not an "exaggerated response" to those objectives. 482 U.S. at 93. The court of appeals below purported to apply *Turner*, but it did so under the influence of its erroneous belief that respondent's conduct was protected by a First Amendment right to provide legal assistance to other inmates. That mistaken premise led the court of appeals, in effect, to treat the letter at issue as if it were entitled to heightened First Amendment

protection simply because it touched on a pending legal proceeding against another inmate.

This Court has recognized many legitimate penological interests in restricting inmate correspondence. The fact that such correspondence concerns a legal matter may or may not bear on the legitimacy of the stated interests, or the relation between those interests and the particular correspondence at issue. The record before this Court does not conclusively demonstrate whether petitioners' decision to discipline respondent on the basis of his letter is reasonably related to legitimate penological interests, or is an exaggerated response to those interests. Accordingly, we suggest that the Court should reverse the judgment below and remand for further consideration of respondent's First Amendment claim under a conventional *Turner* analysis, one that is not premised on the notion that inmates enjoy a First Amendment right to provide legal assistance to other inmates.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY HELD THAT RESPONDENT'S CONDUCT WAS PROTECTED BY AN INDEPENDENT FIRST AMENDMENT RIGHT TO ASSIST OTHER INMATES IN LEGAL MATTERS

A convicted and imprisoned felon "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). In a series of cases, this Court has considered the free speech rights of inmates to communicate with one another and with individuals on the outside. In *Turner* v. *Safley*, 482 U.S. 78 (1987), this Court upheld a state regulation prohibiting inmates from corresponding with inmates at other institutions.

See *id.* at 91-93. As the Court explained, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The Court reached a similar result in *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), where the Court, applying the *Turner* "reasonableness standard," upheld a BOP regulation restricting the types of publications inmates may receive from the outside. *Id.* at 413. See also *Bell* v. *Wolfish*, 441 U.S. 520, 550-551 (1979) (upholding BOP regulation restricting incoming mail because it was a "rational response" to legitimate security concerns).

As the court of appeals observed, the letter at issue in this case, like the correspondence restricted in *Turner* and *Abbott*, "itself constitutes speech that, outside of the prison context, would doubtless enjoy the protection of the First Amendment." Pet. App. 8-9. Thus, in determining whether petitioners violated respondent's First Amendment rights by disciplining him on the basis of that letter, the court of appeals properly invoked the *Turner* standard. See *id.* at 10-14. But the court applied *Turner* based on an erroneous premise: that in addition to a general free speech right, prisoners enjoy a special "First Amendment right to assist other inmates with their legal claims." *Id.* at 6. Based on that premise, the court of appeals reasoned that respondent's letter fell into a "particular category of protected expression"—"legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising"—and that it, in effect, enjoyed heightened constitutional protection. *Id.* at 11. That was error, and that error tainted the court of appeals' entire *Turner* analysis. This Court has never recognized a First Amendment right of prison inmates

to assist other inmates in legal affairs, and it should not do so here.

A. Prisoners Do Not Enjoy A First Amendment Right To Assist Other Inmates In Legal Matters

1. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* v. *Safley*, 482 U.S. at 84. See *Bell* v. *Wolfish*, 441 U.S. at 545. Thus, "[i]nmates clearly retain protections afforded by the First Amendment." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987). See *Pell* v. *Procunier*, 417 U.S. at 822. These protections include the right to free speech, *Thornburgh* v. *Abbott*, 490 U.S. at 407; to petition the government for the redress of grievances, *Johnson* v. *Avery*, 393 U.S. 483 (1969); and to free exercise of religion, *O'Lone*, 482 U.S. at 348. At the same time, however, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone*, 482 U.S. at 348 (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). See also *Sandin* v. *Conner*, 515 U.S. 472, 485 (1995); *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974); *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984) ("prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells").

Accordingly, this Court has held that, "[i]n a prison context, an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (quoting *Procunier*, 417 U.S. at 822). The prison cell block is a starkly different world from the one in which First Amendment activity flourishes in free society.

Prisons "are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance." *Ibid.* "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagation." *Id.* at 132. See *McDonnell*, 418 U.S. at 561-562. Not surprisingly, in this dangerous and volatile world, prisoners' First Amendment rights are substantially circumscribed compared with the rights enjoyed by individuals on the outside.

Taking into account the practical realities of prison life and the need for institutional safety and security, this Court has upheld under the First Amendment substantial restrictions on inmate-to-inmate correspondence, *e.g.*, *Turner*, 482 U.S. at 91-93; receipt by inmates of certain types of publications, *Abbott*, 490 U.S. at 419; *Wolfish*, 441 U.S. at 551; inmate contacts with the media, *Procunier*, 417 U.S. at 828; inmate efforts to engage in union activities, *Prisoners' Labor Union*, 433 U.S. at 129-133; and inmate contact visits, *Block* v. *Rutherford*, 468 U.S. 576, 589 (1984). The Court has also upheld prison work assignment rules that have the effect of preventing prisoners from attending religious services. *O'Lone*, 482 U.S. at 350-353. More generally, the Court has emphasized that behind prison bars First Amendment rights "must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration." *Abbott*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

2. This Court has not recognized a constitutional right—in the First Amendment, or any other part of our National Charter—of prison inmates to dispense legal advice. As this Court has long recognized, the

Constitution does guarantee inmates a "right of *access to the courts*." *Lewis* v. *Casey*, 518 U.S. 343, 350 (1996) (citing *Bounds* v. *Smith*, 430 U.S. 817 (1977)). But in *Casey*, the Court emphasized that the constitutional "right of access" does not confer on inmates "an abstract, freestanding right to * * * legal assistance." *Ibid.* When prison inmates do not enjoy a "freestanding" constitutional right to *receive* legal assistance, it follows that they have no right to *dispense* such assistance. Inmate efforts to assist one another in legal affairs may be entitled to First Amendment protection as speech or expressive conduct. But the First Amendment does not cloak such activities with any added protection in the form of a constitutional right to practice "jailhouse law."

a. In *Johnson* v. *Avery*, the Court held unconstitutional a Tennessee regulation prohibiting inmates from assisting other inmates in "prepar[ing] Writs or other legal matters." 393 U.S. at 484. In so holding, the Court emphasized that "Tennessee does not provide an available alternative to the assistance provided by other inmates," such as a "public defender system." *Id.* at 488-489. "[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," the Court concluded that "it may not validly enforce a regulation * * * barring inmates from furnishing such assistance to other prisoners." *Id.* at 490. At the same time, however, the Court acknowledged that, "[e]ven in the absence of such alternatives, the State *may* impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of [legal] assistance." *Ibid.* (emphasis added).

Avery does not establish a constitutional right of prison inmates to provide legal assistance. *Avery* protects only the ability of inmates to gain "access * * * to the courts." 393 U.S. at 485. See *Casey*, 518 U.S. at 350. Because Tennessee did not make available to its inmates other means of legal assistance, the Court found that the State's rule preventing inmates from assisting one another had the "effect[]" of "forbidding illiterate or poorly educated prisoners to file habeas corpus petitions." 393 U.S. at 487. See *ibid.* ("For all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court."). The Court therefore invalidated that rule "until the State provides some reasonable alternative to assist inmates in the preparation of petitions," *id.* at 490, in order to ensure that inmates would be afforded adequate access to the courts.[7]

In claiming a First Amendment right to assist other inmates in legal matters, respondent does not argue

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[7] In *Wolff* v. *McDonnell*, *supra*, a prison inmate challenged a state regulation permitting prison authorities to open and inspect incoming mail from attorneys. In arguing that this practice was unconstitutional, the inmate relied in part on the constitutional right of "access to the courts" recognized in *Avery*. 418 U.S. at 576. This Court rejected that rationale, stating that this right "has not been extended * * * to apply further than protecting the ability of an inmate to prepare a petition or complaint." *Ibid.* The plaintiff in *Wolff* also challenged a prison regulation preventing inmates from assisting one another in civil actions. Drawing from *Avery*, the Court held that the key issue was whether the prison provided a "reasonable alternative" to inmate legal assistance in such actions, and remanded for a determination whether having one inmate serve as a "legal adviser" amounted to adequate "legal assistance under the reasonable-alternative standard of *Avery*." *Id.* at 580.

that such assistance is necessary to ensure access to the courts, for himself or anyone else.[8] Nor could he, inasmuch as the inmate he sought to assist was represented by appointed counsel. Pet. App. 3. Instead, respondent claims, and the court of appeals embraced, something entirely different: a "First Amendment right to assist other inmates with their legal claims," without regard to whether such assistance is necessary for them to enter the courts. *Id.* at 6.

This right finds no support in the cases following *Avery*, affirming the "right of *access to the courts*." *Lewis* v. *Casey*, 518 U.S. at 350. See *Bounds* v. *Smith*, 430 U.S. at 821 ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts.").[9] As this Court recently recounted in *Casey*, the Court has given effect to "that right by prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents or file them, and by requiring state courts to waive filing fees or transcript fees for indigent inmates." 518 U.S.

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[8] Respondent has raised a separate "right of access" claim, but that claim is not presented here. See note 6, *supra*. In addition, his request to certify this action as a class action on behalf of himself and other inmates was denied, Pet. App. 43-44, and also is not before this Court.

[9] Neither *Bounds* nor this Court's subsequent cases has positively identified the source of this constitutional right. See *Lewis* v. *Casey*, 518 U.S. at 367 ("We have described the right articulated in *Bounds* as a 'consequence' of due process, as an 'aspect' of equal protection, or as an 'equal protection guarantee. In no instance, however, have we engaged in rigorous constitutional analysis of the basis for this asserted right.") (Thomas, J., concurring) (citations omitted); see also *Hudson* v. *Palmer*, 468 U.S. at 523 ("prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts").

at 350 (citations omitted). Respondent does not, and could not, claim that the State is creating any such interference here. Nor does respondent claim that, as a result of petitioners' actions, he was actually "hindered [in] his efforts to pursue a legal claim," as required by *Casey*. *Id.* at 351. His First Amendment claim accordingly finds no footing in *Bounds*.

b. Beyond *Bounds*, the court of appeals suggested that the inmate's right to undertake "legal activities on behalf of other inmates implicated *associational rights* protected by the First Amendment." Pet. App. 9 (emphasis added; citing *Rizzo* v. *Dawson*, 778 F.2d 527, 531 (9th Cir. 1985)); see also Br. in Opp. 5. In particular, the Ninth Circuit (see *Rizzo*, 778 F.2d at 531) has reasoned that this activity is akin to the conduct this Court held protected under the First Amendment in *NAACP* v. *Button*, 371 U.S. 415 (1963), and *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971). This Court, however, has never extended the reasoning of *Button* or its progeny to the prison context and, as we explain, doing so here would require overlooking the fundamental restriction in associational rights that is a necessary and constitutional fact of lawful imprisonment.

Button involved a challenge to a state law preventing the NAACP and its members and lawyers from "associat[ing] for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights." 371 U.S. at 428. The Court concluded that the activities at issue were "modes of expression and association protected by the First and Fourteenth Amendments," and set aside the state law. *Id.* at 428-429. In doing so, the Court explained that "the State has failed to advance any substantial regulatory interest, in the form of substan-

tive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed." *Id.* at 444. *United Transportation Union* is to the same effect. It involved a challenge to a state decree that prevented a union from providing legal assistance to its members or their families. Drawing from *Button*, the Court held that this activity was protected by the First Amendment, and that the decree prohibiting it was invalid. 401 U.S. at 580-581, 585. See also *In re Primus*, 436 U.S. 412, 434 (1978).

Button and its progeny thus recognize a First Amendment right to associate with others for legitimate common goals and to use litigation to advance those goals. Cf. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (distinguishing between the First Amendment "right to associate collectively for the common good," and "the individual interest in best prosecuting a claim"). But the considerations on which that principle is grounded do not readily apply in the prison context. Indeed, this Court has recognized not only that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights" enjoyed by the free, but also that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 125-126 (citation omitted); see also *id.* at 126 (an "inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates."). Among the associational rights necessarily curtailed by lawful incarceration is the right to associate for the purpose of providing legal advice.

Prisoners' Labor Union involved a First Amendment challenge to the actions of state prison officials prohibiting inmates from soliciting other inmates to join a prisoners' labor union, barring the union from meeting, and blocking the bulk distribution of union publications. 433 U.S. at 121. These activities squarely implicated First Amendment rights enjoyed by individuals outside the prison walls. See, *e.g.*, *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). But this Court concluded that the State's ban on such activities inside the prison walls was permissible, and that "[t]he invocation of the First Amendment, whether the asserted rights are speech or associational, does not change this analysis." 433 U.S. at 129. In so holding, the Court emphasized the importance of considering the "prison context" in analyzing First Amendment challenges to prison regulation, *id.* at 129, and, in particular, recognized that "numerous associational rights are necessarily curtailed by the realities of confinement" and "must give way to the reasonable considerations of penal management *Id.* at 132.

For similar reasons, lawful imprisonment curtails the right of inmates to assist one another in legal matters. Indeed, this Court has recognized that, while prisoners are entitled to access to the courts to attack their own sentences or conditions of confinement, "[i]mpairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Casey*, 518 U.S. at 355. Legitimate penal objectives support that conclusion when it comes to the practice of "jailhouse law." While supervised inmate legal assistance programs can serve many valuable ends, it is "indisputable" that jailhouse lawyers "are sometimes a menace to prison discipline," and that prisoners have an "acknowledged propensity * * * to abuse both the giving and the seeking of

[legal] assistance." *Johnson* v. *Avery*, 393 U.S. at 488, 490. In his dissent in *Avery*, Justice White elaborated on these concerns:

> Many assert that the aim of the jailhouse lawyer is not the service of truth and justice, but rather self-aggrandizement, profit, and power. According to prison officials, whose expertise in such matters should be given some consideration, the jailhouse lawyer often succeeds in establishing his own power structure, quite apart from the formal system of warden, guards, and trusties which the prison seeks to maintain. Those whom the jailhouse lawyer serves may come morally under his sway as the one hope of their release, and repay him not only with obedience but with what minor gifts and other favors are available to them. When a client refuses to pay, violence may result, in which the jailhouse lawyer may be aided by his other clients.

Id. at 499-500 (footnote omitted).[10]

Cloaking inmate legal assistance activities with special First Amendment protection would raise other legitimate penological concerns. For example, it would

[10] See also, *e.g.*, *Schenck* v. *Edwards*, 921 F. Supp. 679, 684 (E.D. Wash. 1996) (acknowledging "problems [experienced by prison authorities] with inmates blackmailing and extorting one another based on debts incurred for legal work performed," and with "inmates becoming angry and violent with inmates who drafted and/or filed pleadings or legal materials for inmate litigators when litigators' expectations were not met or the consequences of the legal action turned out to be detrimental to the litigators"), aff'd, 133 F.3d 929 (9th Cir. 1998) (internal quotation marks omitted); *Weaver* v. *Toombs*, 756 F. Supp. 335, 339 (W.D. Mich. 1989) (prison authorities have legitimate interest in preventing "potential exploitation" by inmates providing legal assistance), aff'd, 915 F.2d 1574 (6th Cir. 1990).

confer on inmates who provide legal assistance a type of special status that often is disruptive in the prison world, where uniformity is vital to ensuring order. Cf. *Prisoners' Labor Union*, 433 U.S. at 127-129. And it would present additional opportunities for inmates—under the guise of providing legal assistance—to formulate escape plans, pass contraband through correspondence designated as "legal," and carry out other illegal activities both inside and outside the prison walls. As we discuss below, this Court has recognized many of these same concerns in upholding regulations restricting inmate correspondence on general matters. See pp. 25-26, *infra*.[11]

At the same time, inmate legal assistance programs serve many salutary ends, including helping to ensure that illiterate or non-English speaking inmates have meaningful access to the courts. Prison officials may permit inmates to provide legal assistance to other inmates. Indeed, many States have adopted "inmate law clerk assistance" programs like that of Montana, and permit inmates to assist one another in legal matters in accordance with other prison rules. Similarly, BOP regulations permit an inmate to provide legal assistance to another inmates in the same institution, though they provide that "[t]he Warden at any institution may impose limitations on an inmate's assistance to another inmate in the interest of institution security, good order, or discipline." 28 C.F.R. 543.11(f)(1) and (4). Properly managed, those programs can assist inmates without undermining valid correctional

[11] Recognizing a First Amendment right of inmates to practice jailhouse law also would invite a new avenue for prisoner litigation challenging the adequacy of prison libraries or other legal support services that this Court has recently sought to quell. Cf. *Lewis* v. *Casey*, *supra*.

objectives. But whether or not such programs are viewed as good prison policy, the Federal Constitution does not guarantee inmates the right to assist other inmates in legal matters. Cf. *Prisoners' Labor Union*, 433 U.S. at 137 (Burger, C.J., concurring).[12]

B. Respondent's First Amendment Claim Is Governed By A Conventional *Turner* Analysis

1. Prison inmates do enjoy a First Amendment right of free speech. See *Thornburgh* v. *Abbott*, 490 U.S. at 407. And they retain that right when they speak on

[12] Most courts of appeals that have considered the issue agree that inmates do not enjoy a constitutional right to provide legal assistance. See, *e.g.*, *Goff* v. *Nix*, 113 F.3d 887, 890 (8th Cir. 1997) ("A jailhouse lawyer has no independent right to provide legal advice."); *Gibbs* v. *Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993) ("[T]here is no constitutional right to assist other prisoners with their legal matters."); *Smith* v. *Maschner*, 899 F.2d 940, 950 (10th Cir. 1990) (inmates "do[] not have a protected interest in providing legal representation to other inmates"); *Gassler* v. *Rayl*, 862 F.2d 706, 708 (8th Cir. 1988) ("[A]n inmate simply does not have the right to provide his fellow inmates with legal assistance."). Accord *Tighe* v. *Wall*, 100 F.3d 41, 43 (5th Cir. 1996) (per curiam); *Williams* v. *Nix*, 1 F.3d 712, 716 (8th Cir. 1993). As the Eighth Circuit reasoned in *Gassler*, "[i]t is well established that inmates have a constitutional right of access to the court." 862 F.2d at 707. " This right entitles inmates to receive legal assistance from fellow inmates unless prison officials provide reasonable alternative assistance." *Ibid.* (citing *Johnson* v. *Avery*, *supra*). But "an inmate simply does not have the right to provide his fellow inmates with legal assistance." *Id.* at 708.

Similarly, there is no basis in our history or tradition for recognizing a First Amendment right of prisoners to provide legal assistance to other inmates. Cf. *Lewis* v. *Casey*, 518 U.S. at 382 ("The rise of the prison law library and other legal assistance programs is a recent phenomenon, and one generated largely by the federal courts.") (Thomas, J., concurring) (citing studies).

legal matters. As a result, there remains the question whether respondent was impermissibly penalized under the First Amendment based on the content of his letter. *Turner* v. *Safley* supplies the standard for analyzing that question. In *Turner*, the Court held that prison regulation of inmate correspondence is permissible if it is "reasonably related to valid corrections goals," including "institutional security and safety," and "it is not an exaggerated response to those objectives." 482 U.S. at 93.[13] The *Turner* analysis governs both "facial" and "as applied" challenges. See *id.* at 99-100 (upholding "facial validity" of regulation, but remanding for determination whether regulation was valid as applied); *Thornburgh* v. *Abbott*, 490 U.S. at 419 (same). Respondent brings an as-applied challenge to the enforcement of petitioners' disciplinary rules against him on the basis of the content of his February 16, 1995, letter. See J.A. 66 (Compl. ¶ 17); Br. in Opp. 3, 8-9.

2. a. This Court has recognized many legitimate penological interests in restricting, and even prohibiting, forms of inmate correspondence. "[C]ommunication with other felons is a potential spur to criminal behavior." *Turner*, 482 U.S. at 91. Inmate correspondence

[13] In determining whether a regulation passes muster under *Turner*, the Court considers four criteria. First, the Court looks to whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (internal quotation marks omitted). Second, the Court looks to whether "there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the Court considers the "impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Ibid.* Fourth, the Court looks for "the existence of obvious, easy alternatives." *Ibid.* See *Abbott*, 490 U.S. at 414-418 (discussing factors).

"can be used to communicate escape plans," "arrange assaults and other violent acts," and develop prison gangs and other "informal organizations that threaten the core functions of prison administration, maintaining safety and internal security." *Id.* at 92 (citing G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Nature and Impact on Prisons* 64-65 (1985)). Correspondence among inmates in heightened security units "present[s] special disciplinary and security concerns." *Casey*, 518 U.S. at 361; see 62 Fed. Reg. 4890, 4891 (1997) (legal assistance to inmates in special housing is restricted "[f]or reasons of security, discipline, and good order"). In explaining the Montana inmate correspondence policy, petitioners have cited many of the same considerations. See J.A. 96-97.

In reviewing restrictions on inmate speech, it is imperative to take into account the prison context. Language that may be deemed simply vulgar or tasteless outside the prison can amount to "fighting words" within it. Thus, for example, BOP regulations specifically authorize prison authorities to restrict inmate correspondence containing "gratuitous profanity." 28 C.F.R. 540.15(5); see also 28 C.F.R. 541.13 (inmates may be disciplined for "abusive or obscene language") (Table 3, Code 404); *Abbott*, 490 U.S. at 407 (conduct that is "seemingly innocuous to laymen" may "have potentially significant implications for the order and security of the prison"). Language that "draw[s] inferences about [others'] beliefs, sexual orientation, or gang affiliation" can be particularly disruptive in the prison yard. 490 U.S. at 412. "Insolence" also threatens prison order. 28 C.F.R. 541.13 (Table 3, Code 312). In addition, prison officials need not wait for disturbances to erupt; it is "rational" for authorities to restrict communications "that, although not necessarily 'likely' to lead to

violence, are determined * * * to create an intolerable risk of disorder under the conditions of a particular prison at a particular time." *Abbott*, 490 U.S. at 417.

"In the volatile prison environment, it is essential that prison officials be given broad discretion" in determining what steps are necessary "to prevent * * * disorder." *Abbott*, 490 U.S. at 413. This Court has acknowledged "that the judiciary is ill-equipped to deal with the difficult and delicate problems of prison management," and therefore "afford[s] considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Id.* at 407-408 (internal quotation marks omitted). See *Turner*, 482 U.S. at 77-78. When, as here, "a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities." *Id.* at 85.

b. Inmate-to-inmate correspondence on legal matters may, or may not, raise the sort of legitimate penological concerns implicated by other types of inmate correspondence. As the letter at issue in this case demonstrates, inmate correspondence on legal matters can easily touch on non-legal matters.[14] While routine discussion of legal matters or proceedings may not raise legitimate concerns, accusations, threats,

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[14] Recognizing a First Amendment right of inmates to provide legal assistance to other inmates—and to correspond on such matters—would invite fact-intensive litigation over whether an inmate was acting in his capacity as a law clerk or assistant when he undertook a particular act, or whether an inmate was offering legal advice or assistance, and thus was entitled to such protection. Indeed, respondent here has taken inconsistent positions on whether he was in fact acting as a law clerk when he sent the February 16, 1995, letter. See note 5, *supra*.

gratuitous profanity, or other disruptive or inflammatory remarks made before, after, or in the course of discussing legal matters or proceedings may well raise legitimate concerns. Inmate correspondence on legal matters, like inmate correspondence on other matters, can also be used to pass contraband, speak in code, form disruptive prison alliances, or prompt illegal activity or prison unrest. In short, the fact that an inmate's letter discusses a legal matter or proceeding, in itself, does not eliminate the legitimate penological concerns presented by inmate correspondence in general.[15]

On the other hand, consistent with the First Amendment, prison officials may not penalize inmates simply because they disagree with the "content of the[ir] expression," or for an "arbitrary or irrational" reason. *Turner*, 482 U.S. at 90. Cf. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (even in a nonpublic forum, government may not "suppress expression merely because public officials oppose the speaker's view"). This Court has held, however, that when prison administrators "draw distinctions" between different types of speech or communications "solely on the basis of their potential implications for prison security," they are regulating in a "neutral" and, thus, constitutional fashion—provided that their actions

[15] This case does not present any occasion to consider whether, or to what extent, inmates are constitutionally entitled to correspond with licensed legal counsel outside the prison walls. The Court has recognized, however, that such correspondence presents similar concerns to those presented by inmate-to-inmate correspondence. See *Abbott*, 490 U.S. at 413; cf. *Wolff* v. *McDonnell*, 418 U.S. at 575. On the other hand, incoming and outcoming correspondence with lawyers implicates the First Amendment rights of those who are not prisoners. BOP and virtually all States, including Montana, have adopted separate rules governing the handling of such legal mail. See notes 1, 2, *supra*.

are "rationally related" to asserted penological interests such as safety or security. *Abbott*, 490 U.S. at 415-416.

3. The court of appeals applied *Turner* in determining whether petitioners properly disciplined respondent on the basis of his letter. See Pet. App. 10-14. But it did so based on the mistaken premise that respondent enjoyed a First Amendment right to provide legal services to other inmates. Thus, the court of appeals emphasized that it was dealing with a "particular category of protected expression"—"legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising." *Id.* at 11. The court noted that "the enforcement of the prison regulations against Murphy infringes on [respondent's] First Amendment right to provide legal assistance to fellow inmates." *Id.* at 12. And the court observed that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." *Ibid.* In short, the court treated respondent's letter as if it were entitled to heightened constitutional protection because it was sent by an "inmate law clerk," and, at the same time, unduly discounted the legitimate penological interests in restricting inmate correspondence on all matters, including on legal matters.

Because the court of appeals decided respondent's First Amendment claim based on an erroneous legal standard, we suggest that the appropriate relief is to reverse and remand for application of the correct legal standard. While petitioners have provided substantial reasons for adopting the inmate correspondence policy that permitted them to review respondent's letter to inmate Tracy, see J.A. 95-98, we do not believe that the summary judgment record before this Court con-

clusively demonstrates the particular penological objectives relied upon by petitioners in disciplining respondent in connection with his letter, or whether under the circumstances petitioners' actions amounted to an "exaggerated response" to those objectives. Accordingly, we do not take a position on whether, under a proper application of *Turner*, petitioners impermissibly disciplined respondent based on his letter. Cf. *Turner*, 482 U.S. at 100 (remanding for determination whether "correspondence regulation had been applied by prison officials in an arbitrary and capricious manner"); *Abbott*, 490 U.S. at 419 (remanding for "examination of the validity of the regulations as applied" to particular publications).

CONCLUSION

The judgment of court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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No. 99-1613

IN THE SUPREME COURT OF THE UNITED STATES

NOV 13, 2000

Robert Shaw; Larry Bearley; Michael Mahoney; Myron Beeson; and Richard S. Day,
Petitioners,
v.
Kevin Murphy,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution guarantee a state prison inmate law clerk the unrestricted right to communicate with another state prison inmate regarding a pending legal matter ?

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INTEREST OF *AMICI*

The *amici* States operate prison systems in their respective jurisdictions and each has regulations or policies which, in furtherance of "legitimate penological interests," prohibit or restrict correspondence between inmates even if the correspondence purportedly relates to legal matters. The validity of those regulations is called into question by the Ninth Circuit's holding. Furthermore, the States' ability to maintain the order and security of their prisons will be undermined if the Court affirms the expansive First Amendment right recognized by the Ninth Circuit.

SUMMARY OF ARGUMENT

The Court has historically been sensitive to the volatile nature of the prison environment and has consistently recognized that state prison inmates do not enjoy unrestricted First Amendment rights of expression and association. Specific examples from the states show that inmates repeatedly attempt to exchange contraband including escape plans, weapons, child pornography, and drugs, under the guise of legal materials. Applying the holding of the Ninth Circuit in this dangerous environment severely undermines the efforts of the prison administrators in the *amici* States to maintain the order and security of their correctional institutions. The holding will allow inmates to avoid prison regulations and discipline through communications purporting to be "legal advice."

The holding of the Ninth Circuit also elevates inmate law clerks to a position substantially equivalent with attorneys, thus enhancing the status of the inmate law clerks in the prison. Creating a special status for some inmates leads to dissension, and presents other difficult problems of maintaining order and security in the institutions. Restricting inmate-to-inmate

correspondence is reasonably related to the institutions' interest in maintaining order and security, an interest which the Court has always recognized as a legitimate penological interest.

The *amici* States urge the Court to **reverse** the Ninth Circuit's holding and reaffirm the broad discretion afforded to prison officials to restrict inmate-to-inmate correspondence.

ARGUMENT

The prison environment is volatile. The efforts of prison officials to maintain order and security are highly demanding and require constant vigilance. The Court has repeatedly recognized that prison officials have broad discretion in restricting inmates' First Amendment rights of expression and association. The decision below, which confers an independent, freestanding and unrestricted First Amendment right on an inmate law clerk to give "legal advice" to other inmates, goes beyond any decision of the Court and undermines legitimate penological objectives of prison officials to maintain order and security.

I. THE FIRST AMENDMENT DOES NOT GUARANTEE A STATE PRISON INMATE LAW CLERK AN UNRESTRICTED RIGHT TO COMMUNICATE WITH ANOTHER INMATE REGARDING PENDING LEGAL MATTERS.

The Court has repeatedly recognized that an inmate's constitutional rights may be restricted to the extent that they conflict with institutional rules which are reasonably related to a legitimate penological interest. *Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Turner v. Safley*, 482 U.S. 78 (1987); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Lewis v. Casey*, 518 U.S. 343 (1996). Specifically, the Court has held that the First Amendment rights

of inmates "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations . . . possess the likelihood of disruption of prison order or stability . . ." *Jones*, 433 U.S. at 132. While recognizing that inmates generally have a right of access to courts, *Johnson v. Avery*, 393 U.S. 483 (1969), the Court has not expanded the right of access to hold that an inmate law clerk has an independent, freestanding unrestricted right under the First Amendment to provide legal advice or assistance to another inmate, especially where, as here, an attorney was appointed, and another inmate law clerk was provided by the institution. *Lewis v. Casey, supra.* The Court should not do so in this case.

The Ninth Circuit found that a letter written by Respondent (a high security inmate) to a fellow inmate (Tracy, a maximum security inmate) was an expression entitled to a special, enhanced level of protection under the First Amendment because it contained "legal advice." Pet. App. at 6-7. Additionally, the Ninth Circuit held that Respondent had an independent First Amendment right of association to provide legal assistance to Tracy, not because Tracy who already had court-appointed counsel needed legal advice, nor because Respondent was assigned as a law clerk for Tracy, but because Respondent had provided Tracy legal assistance "on several occasions in the past." Pet. App. at 7. Having established this independent right of an inmate acting in the capacity of a law clerk, the Ninth Circuit then applied a balancing test finding that the prison's penological interest in maintaining order and security is "... at a low ebb when the correspondence in question is legal advice", and held that prison officials could not restrict such communications between inmates. Pet. App. at 12-13. The decision below is neither supported by the decisions of the Court nor any other circuit court.

Correspondence by non-lawyers purporting to give legal advice in a prison has no special status under the First

Amendment. As a threshold matter, although the Ninth Circuit makes no distinction between "legal advice" and "legal assistance", clearly inmate law clerks are not attorneys and have no independent basis to assert a right to provide legal advice. *See, e.g.,* Fla. Admin Code § 33-501.301(10)(i) (prohibiting inmate law clerks from practicing law or appearing in judicial or administrative proceedings on behalf of other inmates). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977) (regulation of the practice of law is "... at the core of the State's power to protect the public").

While the Court has generally recognized an inmate's right of access to courts, the Court has never characterized this as a right of the inmate law clerk. In *Lewis*, 518 U.S. at 350-51, the Court clarified that the right of access to courts, as articulated by *Bounds v. Smith*, 430 U.S.817 (1977), did not constitute a *per se* right to legal assistance. Because there is no freestanding right to receive legal assistance from an inmate law clerk, it is unreasonable to say that the inmate law clerk has a right to give legal assistance. The Ninth Circuit's holding that Respondent has a First Amendment right to give legal assistance to other inmates contravenes *Lewis.*

In *Johnson v. Avery*, *supra*, the Court rejected a prison regulation that prohibited prisoners from assisting each other with habeas corpus applications and other legal matters. The basis for that decision, however, was the fact that no alternative forms of legal assistance were made available to the prisoner, *Johnson*, 393 U.S. at 489, and in *Lewis,* the Court explained that "legal assistance programs are not ends in themselves, but only means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *See Lewis*, 518 U.S. at 351 (citation omitted). The instant case does not present a situation implicating the right of access to the courts. The state district court had already appointed an attorney to represent inmate Tracy, and prison

officials also had provided another inmate law clerk to assist him in this matter. Pet. App. at 7. Ironically, the Ninth Circuit has held that a criminal defendant does not have an unrestricted right to counsel of his choice, *see United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990), but here implicitly holds than an inmate has a right to an inmate law clerk of his choice.

The *Lewis* Court made clear that an inmate's right of access to courts is not to be construed without adequate deference to the judgment of prison administrators. *Lewis,* 518 U.S. at 361. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 361 (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977)).

The holding of the Ninth Circuit appears to confer on an inmate law clerk a freestanding constitutional right to provide legal advice to other inmate. By contrast, other circuits have refused to recognize an independent right which is freestanding from an inmate's right of access to the courts.[1] Indeed, most circuits have not even recognized an inmate's standing to assert

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[1] *See, e.g., Williams v. Nix*, 1 F.3d 712, 716 (8th Cir. 1993) ("[A]n individual inmate does not have a constitutional right to 'practice' jailhouse law."); *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990) (An inmate "does not have a protected interest in providing legal representation to other inmates."); *Tighe v. Wall*, 100 F.3d 41, 42 (5th Cir. 1996) (The court noted that an inmate has no constitutionally protected interest in a specific work assignment and held that "[t]he right to act as inmate counsel in a certain facility is no exception to that general rule."); *Gassler v. Rayl*, 862 F.2d 706,707 (8th Cir. 1988) ("There is, however, no right to be or to receive legal assistance from a jailhouse lawyer independent of the right of access to the court."); *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993) (Court recognized that there was "technically" no right to assist.).

another inmate's claims.[2] The Ninth Circuit's holding should be rejected in favor of the reasoning of the other circuits on this issue. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 561-63 (1974) (refusing to second-guess actions taken by prison officials in recognition of the volatile nature of the prison environment); *Hewitt v. Helms*, 459 U.S. 460, 470-71 (1983).

II. LEGITIMATE PENOLOGICAL INTERESTS SUPPORT REGULATION OF INMATE COMMUNICATIONS INCLUDING THOSE OF LAW CLERKS.

A. Restrictions on inmate-to-inmate correspondence are intended to prevent inmates from passing contraband to each other.

Inmates across the country have attempted to pass contraband disguised as legal mail or legal material. If the Court approves the Ninth Circuit's holding and inmates may exchange purported legal mail without restriction, these incidents will increase dramatically and pose an extreme threat to the order and security of the institutions. Several examples illustrate this

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[2] *See Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998) inmate law clerks, "did not have standing to assert other inmate' claims for denial of their rights of access to courts."); *Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986) ("In the non-class-action context a prisoner has no standing to litigate another prisoner's claim of denial of access to the courts."); *McDonald v. Hall*, 610 F.2d 16 , 19 (1st Cir. 1979) (same); *Buise v. Hudkins*, 584 F.2d 223, 227 (7th Cir. 1978) (same); *Rhodes v. Robinson*, 612 F.2d 766, 769 (3d Cir. 1979) ("Prison writ writers have standing to assert other prisoners' right of access to the courts."); *Gibbs*, 10 F.3d at 378 ("[P]rison officials may not prevent such assistance or retaliate for providing such assistance where no reasonable alternatives are available."). *And cf. Smith*, 899 F.2d at 950 ("Prison inmates do not possess the right to a particular prisoner's help in preparing their legal materials.")

point.[3]

In Ohio, inmates received transcripts as part of their purported legal mail in which officials discovered carved out areas in the bindings where cocaine and other drugs were concealed. In Florida, inmates have sent contraband such as marijuana and money in inmate-to-inmate correspondence labeled as legal mail. Another inmate in Florida was found with a homemade "law book" which contained nude pictures of children and adult females among purported legal materials. Inmates in New York have engaged in the practice of "kiting" in order to avoid the prohibition against inmate-to-inmate correspondence.[4] In another Florida case, a mailroom supervisor testified about finding hacksaw blades under the bindings of a transcript which was sent to an inmate as legal mail.

In Idaho, directions on how to manufacture drugs and potential weapons were found in legal materials and mail. In another Idaho case, two inmates were setting up a law practice from behind bars and were mailing materials to non-attorneys under the guise of legal mail. These inmates had also set up fee arrangements and were charging other inmates for legal work.

An inmate in New York was convicted of participating in racketeering activities as the leader of the Latin Kings gang while incarcerated at Attica. The court noted that the inmate was

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[3] Twenty copies of the compiled incident reports illustrating these examples have been lodged with the Clerk's Office.

[4] The practice of "kiting" involves mailing a letter marked as legal mail to an alleged attorney with a non-existent address. The letter bears the return address of another inmate so it is returned to that inmate when found undeliverable. A second practice of "kiting" involves placing insufficient postage on the letter and the letter is "returned" to the return name and address of another inmate. *See DiRose v. McClennan*, 26 F.Supp.2d 550 (W.D.N.Y. 1998).

skilled at using secret codes to control the Latin Kings organization and orchestrate numerous murders. *U.S. v. Felipe*, 148 F.3d 101, 109 (2d Cir. 1998). Placing such codes in allegedly legal mail would pose a severe threat to the internal order and security of the institution if exchanged within the institution and a more far reaching threat if sent outside the prison environment without inspection. In *Sasnett v. Sullivan*, 908 F.Supp. 1429, 1435 (W.D. Wis. 1995), the court noted that "[t]he most time-consuming aspect of a cell search is the searching of paper such as letters, legal materials, books magazines and newspapers but it is necessary for the security of staff, inmates, and the public. Officers have found razor blades and drugs in such papers as well as motor vehicle registration stickers stolen by an inmate from his institution's production factory and intended to be sent to his family for illegal sale 'on the street.'" (emphasis added).

During the search of an inmate's cell in Virginia, a document was discovered hidden among legal materials which outlined the procedure on how to assemble several different incendiary devices. A further search revealed materials for constructing such a device. In *Altizer v. Deeds*, 191 F.3d 540, 5491 (4th Cir. 1999), the court upheld inspection of an inmate's legal mail noting that during the course of the litigation the inmate had attempted to mail a homemade knife in his legal mail to the federal district court.

B. Prison security and operation will be threatened if inmate law clerks are afforded special rights or a special status.

The Ninth Circuit's decision has the dangerous effect of conferring a special right on inmate law clerks or, for that matter, any inmate who purports to provide legal assistance, thereby elevating such inmates to positions of influence within the prison system. It is well recognized that allowing an inmate to have a

position of power and authority over other inmates presents a serious threat to prison security. *See, e.g., Cooper v. Tard*, 855 F.2d 125 (3rd Cir. 1988)(recognizing the threat to prison authority by inmate adherents of the Nation of Islam who set themselves apart from the other inmates as an affinity group with an established hierarchy). Indeed, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 127-129, the Court recognized the rational relationship between banning inmate solicitation and group meetings where prison administrators claimed that such activity could potentially cause inmate organizers to be power figures among inmates and misuse their influence.

If the Court were to recognize greater First Amendment protection for correspondence to or from an "inmate law clerk" or require heightened scrutiny of prison regulations restricting such correspondence, the Court would be elevating "inmate law clerks" to quasi-attorney status. Such a holding would have a direct and adverse impact on the States because at least 29 states have formal "inmate law clerk" programs or policies which authorize inmates to assist other inmates with legal matters. Florida, for example, has established a program to "certify" inmates as law clerks. Fla. Admin Code § 33-501.301(10). Other states which report having formal training and/or certification programs for inmate law clerks are Illinois, Kentucky, Louisiana, Massachusetts, Michigan, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont and Wyoming. (Source: Fla. Attn'y Gen. phone and e-mail survey of state corrections departments, Oct. 2000). States which report having inmate law clerks but which do not provide formal training or certification for them are Alaska, Georgia, Nebraska, Nevada, New York, South Carolina, and West Virginia. *Id.* States which report having "informal" programs which allow inmates to assist each other with the preparation of legal materials include Indiana, Maryland, Mississippi, New Mexico, Ohio, Texas, Washington and Wisconsin. *Id.*

C. Other "legitimate penological interests" will be frustrated if the Ninth Circuit's holding is affirmed.

In reviewing inmate cases, the Court has held that the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials. *Meachum v. Fano*, 427 U.S. 215 (1976); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). "Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." *Preiser*, 411 U.S. at 492.

The type of legitimate penological interests recognized by courts throughout the country include: *DiRose v. McClennan*, 26 F.Supp.2d 550 (W.D.N.Y. 1998) (heightened scrutiny of inmate's mail was justified after escape plans were found in his mail; abstract of officer's drivers license with home address was confiscated in order to maintain security for correctional officers and to prevent the practice of "kiting."); *Johnson v. Fout*, 173 F.3d 429 (6th Cir. 1999) (rule prohibiting law clerks from charging for their assistance upheld as necessary to maintain security of institution by preventing disagreements and violence among inmates.); *Herlein v. Higgins*, 172 F.3d 1089 (8th Cir. 1999) (court upheld ban on musical cassettes containing labels warning of explicit lyrics as reasonably related to legitimate penological interest of maintaining security; music with violent or sexually explicit lyrics might present security risk.); *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999) (rule prohibiting magazines depicting sexual penetration was necessary to ensure the safety of inmates and prison officers, and protect female officers from abuse and harassment and such publications are likely to cause inmates who come in contact with the materials to harass and/or abuse other individuals); *Rhoden v. Campbell*,

202 F.3d 269 (6th Cir. 1999) (inmate denied request for day off from work to celebrate Million Man March recognizing that staffing and security dilemmas are legitimate penological interests, also upheld decision not to allow inmate to wear fez at work because such religious headgear may be used to conceal drugs, weapons, or other contraband and may spark internal violence among prisoners thus posing security threat); *Billups v. Galassi*, 202 F.3d 272 (7th Cir. 2000) (spot-checks of inmate's non-legal mail was reasonably related to legitimate penological interest of preventing threat which letter presented to prison's security and order; the letter, which described sex act which inmate and girlfriend performed in visitors area could encourage other prisoners to attempt sexual acts during visiting hours, create disrespect for prison rules and foster emotionally charged disputes amongst prisoners over the letter's possession if the letter were to become lost or stolen).

D. Restrictions on inmate-to-inmate correspondence are *per se* reasonable under the *Turner v. Safley* test.

In *Turner*, the Court reviewed state prison regulations governing inmate-to-inmate correspondence and inmate marriage. The Court expressly upheld the rule restricting inmate-to-inmate correspondence because it was reasonably related to a legitimate penological interest. *Turner*, 482 U.S. at 89. As pointed out in the Petitioner's brief on the merits, the Missouri prison regulation approved by the Court's decision in *Turner* prohibited *all* inmate-to-inmate correspondence (including correspondence dealing with legal matters) absent prior approval of prison officials. This regulation, the Court noted, was "consistent with the practice of other well-run institutions, including institutions in the federal system." *Turner*, 482 U.S. at 93. A significant number of states have regulations (or uncodified policies) which prohibit or stringently regulate inmate-to-inmate correspondence. Many of these regulations and policies are patterned after the federal prison regulation (28

C.F.R. § 540.17 (1986)) cited in the Petitioner's brief and, presumably the subject of the Court's reference in *Turner*. The prison regulation adopted in Florida, for example, provides:

> Correspondence with inmates of other penal institutions shall be subject to the approval of the warden of each institution. Either warden may withhold approval if he finds that the intended correspondence would present a substantial threat of interference with the security, order of the rehabilitative objectives of his institution.

Fla. Admin. Code § 33-602.401(4). *Accord* 15 Cal. Admin Code § 3139; Kan. Admin. Regs. 44-12-601(j); 103 Mass. Code of Regs. § 481.21; N J. Admin. Code § 10A:18-2.5; 7 N.Y. Comp. Codes R. & Regs. §§ 720.3(b)(3), 720.6; 37 Pa. Code § 93.2(b)(1); 37 Tx. Admin. Code § 291.2(1)(A). *See also* N.J. Admin. Code § 10:5-6.29(a) ("[I]nmates assigned to the Security Threat Group shall not be permitted to send mail to, or receive mail from, any other incarcerated inmates"); Fla. Admin. Code § 33-501.301(10)(l) (requiring inmate law clerk to obtain prior approval from prison officials to correspond with an inmate law clerk at another institution); Conn. Agencies Regs. § 18-81-30(c)(3) (prohibiting correspondence between inmates except those who are immediate family members); Iowa Admin. Code § 201-20.4(3)g. (same); Utah Admin. R. 251-705-3(19) (prohibiting inmate-to-inmate correspondence in the absence of a "compelling need" and where there is no alternative means of accomplishing that need). *Cf.* 210 Ind. Admin. Code § 3-1-16(b) (authorizing sheriffs to restrict correspondence between inmates in county jails).

Even states which do not appear to prohibit inmate-to-inmate correspondence have regulations which authorize prison officials to open, read and withhold inmate correspondence under certain circumstances. *See, e.g.*, Ohio Admin. Code § 5120-9-18(K); Ga. Comp. R. & Regs. § 125-3-3.01(3); Wis.

Admin. Code § DOC 309.04(2)(c), (4). The Ohio regulations, like the regulations of most states, restrict the prison officials' ability to read "legal mail." *See* Ohio Admin. Code § 5120-9-18(C)(1)-(4) ("legal mail" may only be opened by prison officials in the presence of the inmate and if there is a "reasonable belief that the envelope contains contraband"). However, neither Ohio nor any other states whose regulations define "legal mail" include inmate-to-inmate correspondence or, more specifically, correspondence to or from an "inmate law clerk" within that definition. *See id.* at § 5120-9-18(C). *Accord* Fla. Admin. Code 33-602.402(2); 20 Ill. Admin. Code 525.110(g); Kan. Admin. Regs. § 44-12-601(a)(1); 5 N.C. Admin. Code § 2D.0307(a); Or. Admin. r. 291-131-0010(15); 6 Va. Admin. Code § 15-40-10; Wash. Admin. Code § 137-48-020(8). If the Ninth Circuit's holding were adopted, it would be tantamount to classifying inmate-to-inmate correspondence on legal matters as "legal mail." *Cf. Hall v. Singletary*, 999 F.2d 1537 (11th Cir. 1993) (citing *Turner* and upholding prison's refusal to permit inmate to correspond with another inmate on a legal matter where inmate had failed to comply with prison's rule).

If the Court were to adopt the reasoning of the Ninth Circuit that inmate-to-inmate correspondence purportedly relating to legal matters is entitled to greater First Amendment protection, the Court would not only be receding from its holding in *Turner* and its progeny but would also be invalidating the regulations and practices of many States' prisons, as indicated above.

E. The prison regulations and the actions of the prison officials in this case are reasonable under the *Turner v. Safley* test.

The Court in *Turner* articulated a four-prong test in evaluating the constitutionality of prison rules which impinge on the inmate's constitutional rights. *Turner*, 482 U.S. at 89-90. In deciding whether prison rule is valid, the court should consider:

whether there is valid, rational connection between prison regulation and legitimate governmental interest put forward to justify it; whether there are alternative means of exercising rights that remain open to inmates; whether accommodation of asserted rights will have significant "ripple effect" on fellow inmates or prison staff; and whether there is ready alternative to regulation that fully accommodates prisoners' rights at de minimis cost to valid penological interest. *Id.* at 107.

Respondent, an inmate law clerk classified as high security, attempted to mail a letter to inmate Tracy who was confined in the maximum security unit of the prison. In addition to providing advice on how to handle Tracy's case, Respondent's letter contained allegations about the officer whom Tracy attacked and more information about personal events occurring outside the prison. The facts of the instant case satisfy the test established in *Turner*. First, the policy allowing censorship of inmate-to-inmate correspondence is legitimately related to the institution's interest in maintaining the security of the institution. Second, there was an alternative method of communicating such information because inmate Tracy already had a court-appointed attorney, to whom communication was not restricted, as well as a prison supplied inmate law clerk.

Moreover, accommodating Respondent's asserted right in the instant case would have a tremendous ripple effect on the prison system by establishing another viable option for passing contraband among inmates. Opening additional channels for passing contraband and information to maximum and high security inmates would threaten the security of the institution. Accordingly, the penological interests in this case clearly satisfy the *Turner* standard of review.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NOV 13, 2000

ROBERT SHAW, LARRY BEARLEY, MICHAEL MAHONEY, MYRON BEESON, AND RICHARD S. DAY,

Petitioners,

vs.

KEVIN MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a prisoner have a right to act as a law clerk, separate from the prisoner's right of access to the courts?

2. May the prison authorities prevent a prisoner from sending a letter containing false allegations against a guard to another prisoner who has been segregated from the general prison population and is charged with assaulting the guard who is the subject of that letter?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the creation of a new right for prisoners, a right to act as a law clerk separate from their right of access to the courts. Recognizing this right would disrupt

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

delicate balance of interests maintained by the prisoner right-of-access cases. This threatens prison security, endangering guards and prisoners alike, and intrudes upon the prison administration's discretion to manage prisons free from judicial influences. The dangerous expansion of the prisoner's right to association threatens public safety and is therefore contrary to the interests that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The plaintiff in this case, Kevin Murphy, is a prisoner law clerk in the Montana State Prison. *Murphy* v. *Shaw*, 195 F. 3d 1121, 1123 (CA9 1999). In early 1995 he became aware that Pat Tracy, another inmate, was charged with assaulting Correctional Officer Glen Galle. *Ibid.* Murphy had previously given legal assistance to Tracy and found out that Tracy wanted his help in the assault case. Murphy also knew that Tracy already had appointed counsel for that case. *Ibid.* Since Tracy was in the maximum security wing, they could not directly meet each other. *Ibid.* Murphy, as an inmate in the "high" security classification, was not allowed to visit the maximum security unit, but another inmate clerk with a low security classification was allowed to visit Tracy. Pet. for Cert. 4.

After investigating the matter, Murphy wrote a letter to Tracy in February 1995 in which he asked Tracy not to plead guilty. *Murphy*, *supra*, 195 F. 3d, at 1123. Murphy claimed to have found " 'at least 100 witnesses to testify that Galle is an over zealous [sic] guard who has a personal agenda to punish and harass inmates.' " *Ibid.* The letter further alleged that Officer Galle had made homosexual advances to inmates. *Ibid.* Murphy stated that "[t]here are petitions against" Galle, and that Murphy would be "filing a suit with everyone in Close I and Close II named against him." *Ibid.*

The letter was read by prison officials, who kept it from reaching either Tracy or his attorney. See *ibid.*, and n. 1. As a result of the letter, Murphy was punished by prison officials for

violating prison regulations against insolence and interference with due process hearings. *Id.*, at 1124. The latter finding is implicitly a finding that Murphy's allegations against Officer Galle were false. See *id.*, at 1124, n. 3 (quoting Rule 022); Pet. for Cert. 5. In October 1995, Murphy filed a class action civil rights suit on behalf of all inmate law clerks at the prison, claiming that disciplining him violated the First Amendment, and denied prisoners their right of access to the courts. He also asserted that the prison regulations used to punish him were void on the their face and as applied to legal advice given by law clerks. *Murphy*, *supra*, 195 F. 3d, at 1124. The District Court granted defendant's motion for summary judgment on all claims. *Ibid.* The Ninth Circuit reversed on the First Amendment claim, finding that Murphy was entitled to summary judgment in his favor on this claim. *Id.*, at 1128. The Ninth Circuit did not decide the right of access claim, *ibid.*, while upholding the District Court's dismissal of the facial challenge to the regulations. *Id.*, at 1129. This Court granted Montana's certiorari petition on September 26, 2000.

SUMMARY OF ARGUMENT

While this case is best analyzed under the prisoner's right of access to the courts, that right was not implicated by the acts of the Montana authorities. The prisoner that the plaintiff sought to assist through his letter already had counsel under the Sixth Amendment, a more than adequate alternative to a prisoner law clerk. Furthermore, the administration did not prevent the plaintiff from filing a civil rights suit on behalf of any prisoner allegedly harmed by Officer Galle. There is no right to be a law clerk separate from the right of access to the courts. Since all prisoners had at least adequate access, this right is not implicated.

The First Amendment right of association does not support a right to be a prisoner law clerk. The cases giving civilian organizations the right to find adequate legal representation for

their members have no place in prisons. These cases create a civilian right of access to the courts which is much more extensive than the prison right. Importing these concepts inside the prison walls would disrupt the delicate balance found in the prisoner right-to-access decisions. Finally, these civilian cases are based upon the right of association, the First Amendment right that is the most heavily curtailed within prisons. Since the organizations that are protected under the association right can be banned inside prisons, applying these First Amendment cases to prisons is particularly inappropriate.

The administration did not violate the plaintiff's free speech rights. Although imprisonment does not end prisoners' rights, it necessarily restricts their constitutional protections. The difficulty of running a prison and the important federalism interests in keeping the courts from interfering with prison operation combine to support a very deferential standard for reviewing limitations on prisoners' First Amendment rights. Appropriate deference to prison administrators is achieved by applying the four-part test of *Turner* v. *Safley*.

The Montana authorities satisfied the *Turner* standard. The interest served by their actions, security, is legitimate and content-neutral. Keeping prisoners from using the courts to harass guards through false accusations and keeping prisoners of different security classifications from communication with each other are both rationally related to this interest, thus satisfying *Turner*'s first factor. The second *Turner* factor, the presence of alternate means of communication, is also available, as the plaintiff was not prevented from voicing prisoner complaints against Officer Galle through the prison grievance process or through civil rights litigation. *Turner*'s third factor, the effect that accommodating the plaintiff prisoner would have on the guards and other prisoners, again favors the administration. Accommodating the plaintiff threatens institutional security, placing both guards and other prisoners in danger. The fourth *Turner* factor, the absence of ready alternatives, also favors the administration, since the plaintiff's desire to commu-

nicate with Tracy cannot be accommodated without compromising the prison's interests in preventing guards from being harassed and segregating prisoners of different security classifications.

ARGUMENT

I. The right of access to the courts is not implicated in this case.

This case revolves around prison litigation. The plaintiff was purporting to act as a law clerk when he investigated Officer Galle and when he made the allegations against Galle in his letter to Tracy. The offending letter was intended to influence prison-related litigation and raised the prospect of litigation against the prison. This suit is a class action on behalf of all prisoner law clerks in the plaintiff's prison. Even though this case is seemingly inseparable from prison litigation, the Ninth Circuit deferred analysis under the more straightforward prisoner's right to access to the courts for an esoteric extension of First Amendment case law.

Although this case is best analyzed under the right of access, this right was not implicated by the actions of the Montana authorities. This right is only violated when some prisoner is actually kept from having his or her day in court. Since the disciplinary action kept no prisoner from the courts, the right of access was not implicated.

The right to access is a very limited guarantee that is intended to place minimal burdens on prison authorities. States are not forced into a rigid set of requirements, but instead may meet the constitutional minimums through whatever means they choose. Thus, "a legal access program need not include any particular element we have discussed, and we encourage local experimentation" so long as it satisfies "constitutional standards." *Bounds* v. *Smith*, 430 U. S. 817, 832 (1977). This

combination of deference and flexibility is found throughout the access cases.

So long as the prisoner has some adequate means of presenting his or her claims in court, the constitutional minimum is met. *Johnson* v. *Avery*, 393 U. S. 483 (1969) provides a clear example of this principle. Like the present case, the prisoner in *Johnson* was prevented from giving legal help to a fellow inmate. See *id.*, at 484 (regulation prohibiting inmates from giving legal advice). Even though this Court understood that "writ writers" could menace prison discipline and security, see *id.*, at 488, the Tennessee prison regulation was still unconstitutional because the prisoners had no alternatives for presenting their claims to the courts. *Id.*, at 490. Since there was no "other source of assistance for prisoners" who were incapable of representing themselves in court, the rule was unconstitutional. See *id.*, at 487. Had the state provided an adequate alternative, it could "prohibit mutual assistance among inmates." See *id.*, at 489-490. Representation by an actual attorney is a more than adequate alternative.

The plaintiff in this case was attempting to give legal help to an inmate who was already represented by counsel. See *Murphy* v. *Shaw*, 195 F. 3d 1121, 1123 (CA9 1999). Since the representation concerned a criminal matter, Tracy's assault of Officer Galle, see *ibid.*; Pet. for Cert. 3, the right to access is irrelevant, as Tracy had a Sixth Amendment right to counsel. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). This right to counsel does not include a right to the additional assistance of a fellow inmate. While Tracy may represent himself, *Faretta* v. *California*, 422 U. S. 806, 834 (1975), or may retain counsel of his choice, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624-625 (1989), he has no right to the additional assistance of a freelance inmate paralegal of his own choosing. Criminal defendants who accept appointed counsel do not "have a Sixth Amendment right to choose their counsel." *Id.*, at 624. Similarly, the selection of investigators, paralegals, or experts to help prepare the defense must be left to appointed

counsel or the state. The Montana authorities offered Tracy the services of an inmate law clerk with a lower security classification than the plaintiff, but Tracy refused, insisting upon Murphy. See Pet. for Cert. 4. Even though Tracy wanted the plaintiff's legal help, he was not entitled to it.

There is no right to be a writ writer or law clerk independent of insuring a prisoner's adequate access to the courts. Law clerks or any other component of the right to access such as "prison law libraries and legal assistance programs are not ends in themselves, but are only means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.' " *Lewis* v. *Casey*, 518 U. S. 343, 351 (1996) (quoting *Bounds*, *supra*, 430 U. S., at 825). Prisoners have no right "to *discover* grievances, and to *litigate effectively* once in court." *Id.*, at 354 (emphasis in original). There is only "a right to bring to court a grievance that the inmate wished to present . . . . " *Ibid.* "There is, however, no right to be or to receive assistance from a jailhouse lawyer independent of the right of access to the court." *Gassler* v. *Rayl*, 862 F. 2d 706, 707-708 (CA8 1988); see, *Tighe* v. *Wall*, 100 F. 3d 41, 43 (CA5 1996); *Gibbs* v. *Hopkins*, 10 F. 3d 373, 378-380 (CA6 1993) (claim stated only if no alternatives exist; plaintiff must amend complaint to so allege); *Smith* v. *Maschner*, 899 F. 2d 940, 950 (CA10 1990); *Bass* v. *Singletary*, 143 F. 3d 1442, 1446 (CA11 1998) (collecting cases); but see *Kunzelman* v. *Thompson*, 799 F. 2d 1172, 1178, n. 6 (CA7 1986) (open question under the First Amendment right to association).[2]

The right to access is only violated where there has been an actual injury which frustrates or impedes a prisoner's presentation of a nonfrivolous legal claim. See *Casey*, *supra*, 518 U. S.,

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2. There is also a substantial controversy in the circuit courts over whether an inmate has the standing to assert another inmate's right of access. See *Smith*, *supra*, 899 F. 2d, at 950 (collecting cases). Since this issue has not been raised in this case, *amicus* will not discuss it.

at 351. That has not happened here. Tracy had counsel through his Sixth Amendment right, which more than satisfies the prisoner's right to access. Cf. *id.*, at 354. No other prisoner has been kept from litigating Officer Galle's alleged misdeeds. If plaintiff's allegations were true, then the prisoners harmed by Officer Galle may present their claims in an appropriate forum with the help of inmate law clerks like the plaintiff, as was promised in the letter, see *Murphy*, *supra*, 195 F. 3d, at 1123, or through reasonable alternatives. Since the administration's actions have not kept any prisoner from having his day in court, the right of access has not been implicated, let alone violated.

II. Prisoners do not have a First Amendment right to provide legal assistance to other inmates.

The Ninth Circuit avoided the controlling authority under the right to access, see Part I, *supra*, by invoking the First Amendment right to association to support Murphy's claim. See *Murphy* v. *Shaw*, 195 F. 3d 1121, 1125-1126 (CA9 1999). The decision applied circuit precedent, holding that prisoners had a right to assist their fellow inmates in civil rights litigation under the First Amendment right-to-association decisions. See *id.*, at 1126 (citing *Rizzo* v. *Dawson*, 778 F. 2d 527, 531-532 (CA9 1985) (citing *NAACP* v. *Button*, 371 U. S. 415 (1963) and *United Transportation Union* v. *Michigan Bar*, 401 U. S. 576 (1971))). This is an unnecessary and unrealistic extension of the right to association that has no place in the First Amendment. There is no First Amendment right to be a prisoner law clerk.

The First Amendment doctrine invoked by the Ninth Circuit is unnecessary in the prison context because prisoners already have a right of access to the courts. See, *e.g.*, *Bounds* v. *Smith*, 430 U. S. 817 (1977). The right-of-association cases allow organizations to secure adequate legal representation for individuals who otherwise may be without proper counsel to present their grievances to the courts, a different and more

extensive right of access than that afforded prisoners under *Bounds* and *Lewis* v. *Casey*, 518 U. S. 343 (1996). In *NAACP* v. *Button*, 371 U. S. 415 (1963), Virginia had expanded the definition of "capper" in order to hinder the NAACP in getting clients for civil rights actions. See 371 U. S., at 423-426. What mattered was not the act of soliciting clients, but the fact that the NAACP's litigation gave a voice to people who otherwise would not be heard. In this context,

> "litigation is not a technique of resolving private differences; it is a means for achieving the lawful objections of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." *Id.*, at 429.

The Virginia rule was *therefore* unconstitutional because its vagueness and potential for selective enforcement endangered the ability of people to protect their civil rights through the courts. See *id.*, at 435-436.

The *Button* rule extends to nonpolitical litigation. In a series of cases, this Court upheld the rights of unions to secure counsel for their members in workplace-related personal injury and workers' compensation actions under state or federal law. See *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1, 8 (1964); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 218, 225 (1967); *United Transportation Union* v. *Michigan Bar*, 401 U. S. 576 (1971). Although these decisions went beyond *Button*'s premise of giving a voice to the politically powerless, they still centered on the theme of securing effective representation for the organization's members. As this Court stated in *Trainmen*, "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. *Gideon* v. *Wainwright*, 372 U. S. 335 [(1963)], and for them to associate together to help one another to preserve and enforce their rights under federal laws cannot be condemned as a threat to legal ethics." 377 U. S., at 7. *Mine*

Workers, relying on *Button* and *Trainmen*, also held that the union could retain counsel to represent its individual members in private actions. See 389 U. S., at 223-224. Finally, in *United Transportation Union*, the Court stated "The common thread running through our decision in *NAACP* v. *Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain *meaningful access to the courts* is a fundamental right within the protection of the First Amendment." 401 U. S., at 585 (emphasis added); accord, *In re Primus*, 436 U. S. 412, 426 (1978).

These First Amendment cases are not necessary in a prison context already governed by its own right-to-access jurisprudence, or when the prospective client already has counsel. If a prisoner is prevented from presenting claims attacking his or her sentence or the prison conditions to a court, then the prison right-of-access cases are violated, and the judiciary can intervene to correct the violation. See Part I, *supra*. Therefore the First Amendment right-of-association cases could only be relevant in situations where the prisoner does not have a right to access under *Casey* or the other prisoner rights cases. While the applicability of one constitutional guarantee does not preempt other amendments, see *Soldal* v. *Cook County*, 506 U. S. 56, 70 (1992), the delicate balance struck in the prisoner rights cases should not be disrupted through the intrusion of these civilian right-to-association cases. When one constitutional provision already provides a standard for reviewing a particular government action, that standard should not be subverted by invoking some other part of the Constitution to create a different standard. Cf. *Conn* v. *Gabbert*, 526 U. S. 286, 293 (1999) (the Fourth Amendment, not the Fourteenth, provides the standard to analyze the reasonableness of a search).

The right to access provides an excellent example of the delicate balance in prison law. The civilian First Amendment cases provide for a relatively broad right, allowing organizations considerable flexibility to secure for their members

effective and affordable representation by counsel for any litigation involving a member. See *Mine Workers*, *supra*, 389 U. S., at 223 (not limited to political claims); *United Transportation Union*, *supra*, 401 U. S., at 585 (effective and affordable representation). The prisoner right is far more limited. It is not a right to effective litigation, but merely the ability to present grievances to the courts. *Casey*, *supra*, 518 U. S., at 354. The grievances covered by this right are similarly limited in comparison to the First Amendment right.

> "In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.*, at 355 (emphasis in original).

Letting the right-to-association cases inside the prison walls disrupts the careful balance struck by this Court in *Casey* and its other prisoner access-to-the-courts cases, because the broad association right and the limited prisoner right are incompatible. Therefore no other circuit follows this expansive interpretation of the right to association. See *Bass* v. *Singletary*, 143 F. 3d 1442, 1446 (CA11 1998) (listing cases).

The *Button* line of cases is particularly inappropriate to apply to prisons because they are based upon the right to association.

> "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as

obvious, the inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 125-126 (1977).

The types of organizations which can help their members get access to the courts in the civilian world can be banned inside prisons. While labor unions were the beneficiaries of the *Trainmen*, *Mine Workers*, and *United Transportation Union* cases, such organizations are prohibited inside prisons. See *id.*, at 126, n. 4. Prison authorities can prevent the formation "of a functioning organization of the inmates within the prison" through such means as banning inmate solicitation or group meetings by prisoners. See *id.*, at 129. Since a prison can forbid "concerted group activity" by prisoners, see *ibid.*, the right to association decisions have no place inside the prison. These cases are simply irrelevant to prison life and do not allow a court to circumvent the limits placed on the prisoner's right of access to the courts by this Court in *Casey*.

III. The administration did not violate the plaintiff's free speech rights.

Although the right to association does not apply to this case, the First Amendment is still implicated. Preventing the plaintiff's note from reaching Tracy and punishing him for sending it does impact his free speech rights. Although the "[p]rison walls do not form a barrier separating prison inmates from the Constitution," *Turner* v. *Safley*, 482 U. S. 78, 84 (1987), it is equally true that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 125 (1977). The limits on prisoner rights come from many sources. "The limitations on the exercise of constitutional rights arise

from both the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security." *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987). A chief purpose of prison is to deter crime by punishing those convicted of crimes. See *Rhodes* v. *Chapman*, 452 U. S. 337, 352 (1981). If a prison is to punish, then the prisoners' rights must be curtailed. Since security is also a paramount concern in prisons, see *Jones*, *supra*, 433 U. S., at 132, great deference is accorded to prison officials in security matters. See, *e.g.*, *Thornburgh* v. *Abbott*, 490 U. S. 401, 407-408 (1989). Finally, federalism also limits federal judicial supervision of state prisons in the name of prisoner rights. See *Turner*, *supra*, 482 U. S., at 85. "The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Meachum* v. *Fano*, 427 U. S. 215, 229 (1976).

Respecting federalism and "the 'inordinately difficult undertaking' that is modern prison administration," *Thornburgh*, *supra*, 490 U. S., at 407 (quoting *Turner*, *supra*, 482 U. S., at 85), this Court applies a deferential standard to prison regulations that implicate a prisoner's First Amendment rights. The analysis, which was first formally recognized in *Turner*, relies on four factors. First, courts look to whether there is "a 'valid logical connection' between the prison regulation and the legitimate government interest put forward to justify it." *Turner*, *supra*, 482 U. S., at 89 (quoting *Block* v. *Rutherford*, 468 U. S. 576, 586 (1984)). Second, the availability of alternate means of exercising the right is evidence of the regulation's reasonableness. *Id.*, at 90. Third "is the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally . . . . Finally, the absence of ready alternatives is evidence of the reasonableness of the prison regulation." *Ibid.*

The first and most important factor in the *Turner* test, the action's rational relation to legitimate interests, is satisfied in

this case. The Court of Appeals found that the regulations invoked to punish the plaintiff satisfied the first *Turner* factor. *Murphy* v. *Shaw*, 195 F. 3d 1121, 1126-1127 (CA9 1999). As to the actual decision to intercept the letter and apply the regulations to the plaintiff, the Ninth Circuit effectively dispensed with the first *Turner* factor, as it " 'balance[d] the importance of the prisoner's infringed right against the importance of the penological interest served by the rule." *Id.*, at 1127 (quoting *Bradley* v. *Hall*, 64 F. 3d 1276, 1280 (CA9 1995)). It found the plaintiff's First Amendment interest in acting as a law clerk high,[3] while the government's security interest weak, as other means were available to guard its interests. *Ibid.* Finding "that the 'logical nexus' here between the governmental interest and the application of the rules to law clerk correspondents is weak,' " the Ninth Circuit labeled the administration's actions " 'an exaggerated response' " that tipped the balance of interests in the plaintiff's favor with respect to Turner's first factor. See *ibid.*

This contradicts the standards set forth by this Court for reviewing the decisions of prison authorities. While there is a necessary balancing between the prisoners' rights and government interests, like security, that balance is struck with deference to the great burdens placed on prison administrators. "Acknowledging the expertise of these [prison] officials and that the judiciary is 'ill-equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Thornburgh*, *supra*, 490 U. S., at 407-408. That balance is maintained by applying each part of the *Turner* test in its entirety. *Turner*'s first part simply addresses whether there is an appropriate government interest to justify the regulation and the

3. This premise is incorrect, as there is no First Amendment right to act as a law clerk. See Part II, *supra*.

regulation's logical relationship to that interest. See *Turner*, *supra*, 482 U. S., at 89-90. No balancing is involved. The balancing of interests is achieved by applying the remaining three *Turner* factors, where the various interests and the costs of their accommodation are weighed. The Ninth Circuit's rebalancing effectively equates the interests of the prisoner and the administration, contrary to the deference that this Court accords to those who run our prisons.

This deference does not end with the regulation, but applies equally to the administration's enforcement of its regulations. Although this Court applies the *Turner* standard to general prison regulations, as opposed to their specific application, the case for deference is even stronger when addressing the more specific decisions of prison administrators. Judges should not micromanage prisons. This Court has taken pains to "reaffirm our refusal, even where claims are made under the First Amendment to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration,' *Block* v. *Rutherford*, 468 U. S. 576, 588 (1984), for the determinations of those charged with the formidable task of running a prison." *O'Lone*, *supra*, 482 U. S., at 353. If the courts are to be kept from running the prisons, then the individual decisions of administrators must be given at least the same deference as for the regulations that they write.

The government interest, security, is unquestionably legitimate and neutral. See *Thornburgh*, *supra*, 490 U. S., at 415. The actions in response to the plaintiff's letter are also rationally related to maintaining this interest. In addition to protecting prisoner rights, the courts are also used by prisoners as a means to harass or intimidate prison personnel. Prisoners "have essentially nothing to lose, including time, by prosecuting such actions [prisoner initiated suits], and they may gain something even if it is nothing but the satisfaction of harassing, inconveniencing and annoying those who have them in charge." *Wycoff* v. *Brewer*, 572 F. 2d 1260, 1267 (CA8 1978), overruled on other grounds, *Williams* v. *Delo*, 49 F. 3d 442, 446 (CA8

1995). Therefore prisoners use the threat of litigation in an attempt to extort favors from the guards or administrators or to deter them from enforcing discipline. See *id.*, at 1266; Doumar, Prisoners' Civil Rights Suits: A Pompous Delusion, 11 Geo. Mason U. L. Rev. 1, 18-19 (1988) (quoting *Wycoff* and noting it is consistent with the experience of most federal judges). If guards and administrators are afraid to enforce the rules for fear of legal retaliation, then discipline is sure to erode, threatening both guards and prisoners. See Engel & Rothman, The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence, 7 Harv. J.L. & Pub. Pol'y 413, 431-433 (1984).

The plaintiff was, in effect, punished for making false accusations against a guard. See *supra*, at 2-3. The state certainly can protect guards from intentionally false accusations made by prisoners. The fact that the plaintiff chose another prisoner's litigation as the vehicle for his harassment does not change the analysis. Since the litigation was an attempt to punish an inmate for assaulting a guard,[4] it is reasonable to see the letter as an attempt to harass Officer Galle for reporting the assault, which threatens to intimidate guards from making such reports in the future. This does not have to be the most likely interpretation in order to satisfy the *Turner*'s reasonableness standard. Instead, "the logical connection between the regulation and the asserted goal [cannot be] so remote as to render the policy *arbitrary or irrational*." *Turner*, *supra*, 482 U. S., at 89-90 (emphasis added).

The Montana authorities were neither arbitrary nor irrational when they sought to protect Officer Galle. Attacking the victim or witness is one way to deter the reporting or prosecution of criminal acts. Harassing guards also hurts morale. The privilege of being a law clerk is not a right to harass guards.

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4. Tracy pled guilty to assaulting Officer Galle. See *Murphy* v. *Shaw*, 195 F. 3d 1121, 1123, n. 1 (CA9 1999).

The state also has a substantial interest in controlling the communications between prisoners. Cf. *Turner*, *supra*, 482 U. S., at 92 (correspondence between prisoners in different institutions "facilitates the development of informal organizations that threaten" security). When the authorities placed Tracy in maximum security, they separated him from high security prisoners such as the plaintiff. This physical isolation can reasonably include limits on communication, particularly when it involves an assault on a guard. Indeed, the authorities did not prevent all law clerks from helping maximum security inmates like Tracy, but only those in high security, such as the plaintiff, because the security risk was too great. See Pet. for Cert. 4. The prison, in accordance with its policy, instead sent a low security inmate law clerk to help Tracy. Tracy rejected this offer, insisting upon the plaintiff. See *ibid.* The prison was not arbitrarily denying legal aid to Tracy. Instead, it rationally sought to preserve security, and therefore satisfied the first *Turner* factor.

The availability of other means of communication, *Turner*'s second factor, see 482 U. S., at 90, reinforces the conclusion that the authorities acted reasonably. The plaintiff sought to expose Officer Galle's alleged misdeeds and to provide Tracy with this information to aid his defense against the charge of assaulting Officer Galle. A better way to expose a guard's actual misdeeds is not by a letter to another prisoner, but through the prison's grievance mechanism or federal civil rights litigation, as the plaintiff promised to do in his letter to Tracy. See *Murphy*, *supra*, 195 F. 3d at 1123. These are legitimate alternate means of communication under *Turner*. See *Jones*, *supra*, 433 U. S., at 130, n. 6. Since Montana has not foreclosed either option, the plaintiff could still expose Officer Galle's alleged wrongs. Of course, the plaintiff would actually have to come up with proof before a grievance hearing or a court.

If the plaintiff had utilized the proper forums to voice his complaints, Tracy's defense team could have found any

information worth discovering. Prisoner grievances against Officer Galle would be placed in his personnel file, which competent counsel could obtain through discovery. Counsel could then use his or her professional judgment to evaluate whether the complaints warranted further investigation, and advise Tracy on its potential impact on his defense. The existence of these other channels heavily favors the reasonableness of the administration's actions. "Where 'other avenues' remain available for the exercise of the asserted right, see *Jones* v. *North Carolina Prisoners' Union*, *supra*, at 131, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.' " *Turner*, *supra*, 482 U. S., at 90 (quoting *Pell* v. *Procunier*, 417 U. S. 817, 827 (1974)).

Turner's third factor, the impact of accommodating the plaintiff on the guards and the other prisoners, see *ibid.*, again supports deference. "In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Ibid.* The present case follows this pattern, even though it involves a single disciplinary action. If one prisoner can get away with using the prison mails and prison litigation to malign a guard, others will follow in the plaintiff's footsteps. Besides harassing the guards, such practices can make them less willing to confront inmates and enforce discipline, thus endangering prisoners and guards.

Finally, *Turner*'s fourth factor, "the absence of ready alternatives," see 482 U. S., at 90, also supports reasonableness. It is important to understand that the cost of accommodation must truly be minimal in order to be considered as an alternative. Prisons are not required to employ the least restrictive means available when limiting a prisoner's speech. See *ibid.* Instead this factor favors the prisoner only "if an inmate claimant can point to an alternative that fully accommodates the

prisoner's rights at *de minimis* cost to valid penological interests . . . . " *Id.*, at 91.

Such accommodation is not feasible in this case. The threat to institutional security was posed by the heart of the letter, the plaintiff's allegations against Officer Galle and his attempt to influence Tracy's litigation through this information. Any attempt to "shield" Officer Galle from this information, cf. *Murphy*, *supra*, 195 F. 3d at 1128, is therefore impossible without compromising the full accommodation of the plaintiff's speech. Nor can Officer Galle be immunized from effects of the letter if it is not read by him. At best, he will not be allowed to know that a prisoner is making false, highly prejudicial allegations about him. More importantly, the prison's interest in preventing high and maximum security inmates from communicating with each other, see *supra*, at 17, is compromised by creating a legal advice exception to this rule, whether or not Officer Galle is shielded from the content of the plaintiff's letter.

Prisons are self-contained universes with their own special rules. Regulations that would "raise grave First Amendment concerns outside the prison context," *Thornburgh*, *supra*, 490 U. S., at 407, can be an entirely reasonable accommodation of the prison's special needs. The decision to stop the letter and punish the plaintiff rationally advanced prison security, left him with alternative means of communication, protected the general population of prisoners and guards from a ripple effect, and had no alternative without significant cost to the prison system. It is not necessary for this Court to agree with what was done in order to uphold the administration. "It is enough to say that they have not been conclusively shown to be wrong" that the letter threatened prison security. See *Jones*, *supra*, 433 U. S., at 132. The Montana administrators have more than satisfied this low standard. To hold them to any different standard would threaten to substitute the judgment of courts for the judgment of those charged with running the prisons.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

November, 2000

Respectfully submitted,

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DEC 11 2000

No. 99-1613

IN THE

Supreme Court of the United States

ROBERT SHAW, et al.,

Petitioners,

—vs.—

KEVIN MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS WATCH AND SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Thus, the ACLU has a particular interest in the punishment of prisoners for exercising rights guaranteed by the First Amendment to the United States Constitution.

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and where necessary conducts class action litigation on prison conditions and mistreatment and brutality against prisoners.

Human Rights Watch is a private non-profit and non-partisan organization that works to promote respect for international human rights worldwide. In the United States, one of its key priorities for the past decade has been conditions of confinement for adults and children. Through research, reporting and advocacy Human Rights Watch publicizes human rights violations and promotes policies and practices that will prevent abuses against inmates and detainees and hold

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[1]No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

accountable those who commit them. Human Rights Watch has a strong interest in efforts to punish inmates for communicating information about official misconduct: such communications are an important means by which prisoners protect their right to be free of abuse and are a vital source of information about conditions behind prison walls.

For nearly 25 years, the Southern Center for Human Rights, a private non-profit organization, has been engaged in litigation, public education and advocacy to protect the civil and human rights of persons confined in the prisons and jails of the South. The Center challenges unconstitutional practices in prisons and jails by bringing lawsuits on behalf of the imprisoned, and by providing free legal assistance to prisoners challenging brutality or the conditions of their confinement. In 1998, the Center settled *Anderson v. Garner*, a case involving brutal beatings of hundreds of prisoners at the direction of the Commissioner of the Georgia Department of Corrections. The Center was forced to seek a protective order to prevent retaliation against the officers who testified against the prison.

SUMMARY OF ARGUMENT

Respondent Kevin Murphy, assigned to work as an inmate law clerk, wrote to another prisoner informing him that a prison guard who had accused that prisoner of assault had himself engaged in serious misconduct. Rather than investigate the allegations, petitioners, Montana State Prison officials (hereafter "the prison") punished Mr. Murphy, without any showing that his letter was false or malicious, and despite an explicit finding his conduct did *not* impair prison security. They claim, in effect, an unfettered right to punish prisoners who complain about abuse by prison guards.

To legitimize such retaliatory punishment would further institutionalize a culture of impunity within prisons. Prisons

exhibit an enduring tendency to suppress criticism of official misconduct occurring behind their walls. Their insularity from mainstream society and their coercive mandate combine to create an environment in which abuse of authority is an ever-present danger, yet accountability is drastically diminished. The result is a pervasive prison culture of extreme loyalty by staff, including the rigid "code of silence" by which staff and supervisors shield one another from accountability. Prisoners who complain about abuse or criticize their jailers are targeted by prison staff for retaliation in order to secure their silence. By ensuring impunity, this culture fosters abuse and permits cover-ups on a scale virtually impossible in free society.

The speech that the prison punished--peaceful criticism of a government officer--is at the core of First Amendment protection. The prison had no substantial security or other justification for punishing it, and indeed absolved Mr. Murphy of charges of violating security. The prison had no rule prohibiting prisoners from corresponding, nor any restriction governing to whom inmate law clerks could write. Rather, the prison disciplined Mr. Murphy because of the contents of his letter, concluding that relating information about misconduct by a correctional officer violated prison rules against "insolence" and "interference with due process hearings," even without any finding that the information was false, malicious, or intended to harass the staff.

The Ninth Circuit Court of Appeals correctly concluded that the First Amendment protected the communication here, relying in part on circuit precedent concerning application of the First Amendment to inmate law clerks. In our view, under more general free speech principles, any prisoner has a First Amendment right to communicate information concerning official misconduct, subject to reasonable restrictions on the manner in which the communication is made. Thus the Court need not address Mr. Murphy's inmate law clerk status.

The government may limit prisoner speech in ways that are reasonably related to legitimate and neutral government interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). But the Court has never upheld the type of restriction presented here, in which discipline is imposed *solely* because the speech was critical of prison staff. And it should not do so, because punishment of speech criticizing staff has no reasonable relationship to any legitimate, neutral government interests, and the government has no legitimate, neutral interest in suppressing it. Punishing this speech is an exaggerated response to security interests. This result does not jeopardize prisons' authority to enforce legitimate restrictions on prisoner speech, such as rules that ensure that speech takes place in an orderly and non-dangerous manner; or rules that prohibit communication among certain classes of prisoners, as in *Turner*; or restriction of material that is hazardous to prison security. It does mean that prisons cannot punish someone solely for communicating information about official misconduct that the authorities find unwelcome.

Additionally, Mr. Murphy's punishment was unconstitutional because prison rules did not adequately provide notice that they proscribe this type of communication. A prisoner could not be expected to know that a private communication with another prisoner could constitute "insolence" against an officer who did not even overhear the statement. Nor could a prisoner presume that identifying witnesses for a prisoner involved in a criminal proceeding, or providing information critical of staff, would be prohibited as "interfering with a due process hearing." Nor is there a shred of evidence in the record to show that Mr. Murphy's statements were false.

ARGUMENT

I. Prisons Have an Inherent and Persistent Tendency to Suppress Criticism of Official Misconduct.

"All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting). In particular, government prefers to silence criticism of itself. This tendency is particularly pronounced in prisons, because of their isolation from public scrutiny, and their authoritarian task and accompanying unique social structure. *See West v. Atkins*, 487 U.S. 42, 56 n.15 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 203-05 (1985).[2] These institutional features not only provide fertile ground for abuses of the prison's coercive power, but also operate in predictable ways to shield officials who misuse their power from accountability.

In this closed, secretive environment, the government wields its maximum authority to suppress dissent and conceal

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[2]In both these cases, the Court acknowledged how the nature of the prison can distort official conduct to the detriment of prisoners' rights. In *West*, discussing prison medical care, the Court acknowledged:

> [T]hat correctional setting, specifically designed to be removed from the community, inevitably affects the exercise of professional judgment. Unlike the situation confronting free patients, the nonmedical functions of prison life inevitably influence the nature, timing, and form of medical care provided to inmates. . . . [S]tudies of prison health care, and simple common sense, suggest that [the] delivery of medical care was not unaffected by the fact that the State controlled the circumstances and sources of a prisoner's medical treatment.

487 U.S. at 56 n.15.

In *Cleavinger*, the Court recognized similar institutional pressures distorting the conduct of prison disciplinary hearing officers. 474 U.S. at 203-05; *see infra* at 10.

misconduct. To grant prison authorities more tools to suppress criticism -- as the prison seeks here -- is to invite abuse of that power. Prisons' code of silence and corollary pattern of covert retaliation and outright suppression of dissent already make it extremely difficult to uncover and redress abuse by prison staff. Permitting prisons to punish prisoners who truthfully complain of misconduct serves only further to insulate officials from accountability and to perpetuate abuse.

A. Prisons' unique isolation from society shields abuse from public view and accountability.

Prisons are singularly isolated from the outside world. In other public institutions, "the openness. . . and supervision by the community afford significant safeguards against. . . abuses," in contrast to the "jailhouse[,] where the door is closed, not open. . . and where there is little, if any, protection by way of community observation." *Cleavinger*, 474 U.S. at 205.

Prisons have clung to this insularity, deeply resisting efforts to open their doors to community oversight or increased communication between prisoners and the outside. *See* James B. Jacobs, *Stateville* 29 (1977); Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons* 23-25, 81-82, 176-77, 185-202 (1987) (describing resistance of prisons to reforms). Isolation permits misconduct to occur with impunity from the outside world's standards of accountability, and makes it exceedingly difficult to observe or investigate abuses within prisons.

B. Prisons are characterized by a pervasive caste system that encourages abuse by ensuring impunity for official misconduct.

Prisons officials occupy a unique social world due to their role as agents of an isolated and "inherently coercive

institution" (*West v. Atkins*, 487 U.S. at 56 n.15) tasked with using force to achieve institutional goals. Prisons share this feature with police: this "fundamental culture" of law enforcement "is everywhere similar. . . since everywhere the same features of the police role--danger, authority and the mandate to use coercive force--are present. This combination generates and supports norms of internal solidarity or *brotherhood*." Jerome H. Skolnick & James J. Fyfe, *Above the Law* 92 (1993); *see id.* at 95-98; *see also* James W. Marquart, *Prison Guards and the Use of Physical Coercion as A Mechanism of Prisoner Control*, 24 Criminology 347, 361 (1986) (explaining how "coercion builds solidarity"). Far beyond mere professional allegiance, the solidarity of the prison staff is part of a strict caste system, a profound "dichotomy between 'us' and 'them.'" Martin, *supra*, at 23; S. Kirson Weinberg, *Aspects of the Prison's Social Structure*, 47 Am. J. Soc. 717, 719-720 (1942); Skolnick, *supra*, at 111. "The division into 'cons' and 'screws' (guards) in prison society is even more basic than the Middletown dichotomy into workers and businessmen. . . Just as the Southern cotton plantation during slavery times exhibited a sharp division into two major groups. . . so also does the American prison." Norman Hayner & Ellis Ash, *The Prison as A Community*, 5 Am. Soc. Rev. 575, 578 (1940).

Maintaining these deep divisions is critical, as "the guard's only basis for authority is his rank within the caste system." Jacobs, *supra*, at 179. In prison, "a separate moral order emerged for prison officials and for staff. An officer's status in the [corrections] community, his sense of purpose and of right and wrong, were all dependent on approval from the authoritarian regime." Martin, *supra*, at 23. Loyalty to fellow staff members becomes the paramount concern. *Id.*; Jacobs, *supra*, at 202; Skolnick, *supra*, at 111, 122; Weinberg, *supra*, at 724. "In the closed society of. . . departments that see themselves and the public in terms of 'us' and 'them' and adopt

the siege view of the world, the pressure to remain loyal is enormous." Skolnick, *supra*, at 111; *see also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275, 1306 (1999) (discussing "the siege mentality, the us/them attitude. . . the blue wall of silence, and the elevation of loyalty over integrity" of police culture). Disloyalty thus is perceived not only as a break in group cohesiveness, but as a direct threat to the authoritarian prerogatives of all members of the law enforcement caste.[3]

The well known law enforcement "code of silence" flows directly from this system, as the caste structure fosters an "attitude of fierce loyalty and protectiveness within the ranks to

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[3]Loyalty in the caste system is "inherent in the prison situation [and] can neither be controlled nor modified by any single individual of either group. In fact, the individuals who do not conform to these group representations are considered variants and subject to the controls and pressures of their respective stratum." Weinberg, *supra*, at 26.

The force of this observation was demonstrated in the classic Stanford study by Philip Zimbardo, which created a mock prison and randomly assigned students as prisoners and guards. Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Int. J. Crim. & Penology 69 (1973). The experiment was shut down early because of the "frightening" results, as students took to their roles with alarming intensity. Philip Zimbardo, *The Pathology of Imprisonment, reprinted in* Lawrence F. Travis III, *Corrections: An Issues Approach* 99, 100 (1983); Haney, at 80-81. One third of the guards became "tyrannical in their arbitrary use of power." *Id.* at 101; Haney, at 85-86, 88-89. Although others were more benign,

> no good guard ever interfered with a command by any of the bad guards; they never intervened on the side of the prisoners, they never told the others to ease off because it was only an experiment, and they never even came to me as prison superintendent or experimenter in charge to complain. . . . In a sense, the good guards perpetuated the prison more than the other guards because their own needs to be liked prevented them from disobeying or violating the implicit guards' code.

Zimbardo, at 101; *accord* Haney, at 94.

the point that officers refuse to address or report each other's misconduct." *Sharp v. Houston*, 164 F.3d 923, 935 (5th Cir. 1999); *see also* Marquart, *supra*, at 361.[4] The code of silence "consist[s] in a single rule: an officer does not provide adverse information against a fellow officer. . . . all police officers adhere to this rule, even good ones. It is a formidable barrier to the investigation of complaints about the police." *Blair*, 223 F.3d at 1081 (quoting *Report of the Independent Commission on the Los Angeles Police Department* 168 (1991).

The code of silence is equally well entrenched in prisons and jails. *See, e.g., Jeffes v. Barnes*, 208 F.3d 49, 52-53, 62 (2d Cir.), *cert. denied*, 121 S. Ct. 47 (2000) (describing code of silence in jails and retaliation against officer who reported beating of prisoners); *Meriwether v. Coughlin*, 879 F.2d 1037, 1049 (2d Cir. 1989) (citing Commissioner's testimony that "corrections officers generally adhere to a 'code of silence' and lie to conceal other officers' assaults on prisoners"); *Smylis v. City of New York*, 25 F. Supp.2d 461, 463 (S.D.N.Y. 1998) (jail supervisor's acknowledgment of code); *Madrid v. Gomez*, 889 F. Supp. 1146, 1156 & n.4 (N.D. Cal. 1995) ("undeniable presence of code of silence" at prison was direct cause of pattern of brutality; testimony about existence of code); Zimbardo, *Pathology*, *supra*, at 101.

The code not only encompasses passive silence, but

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[4]For additional finidngs about the code of silence, *see Blair v. City of Pomona*, 223 F.3d 1074, 1081 (9th Cir. 2000); *White-Ruiz v. City of New York*, 983 F. Supp. 365, 379 (S.D.N.Y. 1997)); *McLin v. City of Chicago*, 742 F. Supp. 994, 1001-02 (N.D. Ill. 1990); *Brandon v. Allen*, 645 F. Supp. 1261 (W.D. Tenn. 1986); Skolnick, *supra*, at 108-112; The City of New York Commission to Investigate Allegations of Police Corruption, Commission Report (1994) (Mollen Commission); Human Rights Watch ("HRW"), *Shielded From Justice* 68-69 (1998); Bandes, *supra*, at 1306-07; Myriam E. Gilles, *Breaking the Code of Silence*, 80 Boston U. L. Rev. 17, 66-88 (2000).

"also takes the active forms of covering up wrongdoing, and lying under oath." Bandes, *supra,* at 1326. It adheres throughout the ranks: supervisors not only lie to protect staff, but affirmatively avoid learning of misconduct so as not to discipline staff.[5] *Id.;* Skolnick, *supra,* at 7,122; HRW, *Shielded From Justice,* at 44-45; *Brandon,* 645 F. Supp. at 1266. The demands of loyalty also skew internal disciplinary proceedings, for as this Court recognized, staff "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Cleavinger,* 474 U.S. at 204.

> [Committee members] are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Id.; see also Perry v. McGinnis, 209 F.3d 597, 605-06 (6th Cir. 2000) (finding prison had quota on number of inmates who could be acquitted of disciplinary charges). Or, as one guard summarized, "We'd never act as a witness for an inmate." Ted Conover, *Newjack: Guarding Sing Sing* 284 (2000).

The code of silence encourages abuse by ensuring impunity:

> The code of silence . . . permitted and condoned police misconduct as surely as a written rule expressly immunizing officers from any inquiry into acts of violence. If Memphis had any nominal rule forbidding

[5] *See, e.g., Jeffes,* 208 F.3d at 53-54, 58, 60-61 (finding jail leadership accountable for cover-up by staff); *Sharp,* 164 F.3d at 936 (supervisors participate in maintaining code of silence).

> police violence, it was little more than a dead letter. The police officers who knew of the mistreatment of civilians uniformly suppressed that information, and their supervisors, although well aware that criminal conduct was being concealed in this manner, made no apparent effort to impose sanctions on any of the officers involved in the cover-up.

Brandon v. Allen, 645 F. Supp. at 1266-67, 1271.

In these circumstances, abuse and cover-ups are rampant. For example, in a Texas jail, a videotape showed an egregiously abusive search in which a riot squad forced unresisting prisoners to lie on the floor, kicked and beat them, used stun guns, forced them to crawl naked on their stomachs, and unleashed dogs who mauled and bit several prisoners. *See In Re Texas Prison Litigation,* 191 F.R.D. 164, 166-167 (W.D. Mo. 1999); *Kesler v. King,* 29 F. Supp.2d 356, 362-63 (S.D. Tex. 1998). For months, prison authorities engaged in a pattern of cover-up and lies about the incident. *Kesler,* 29 F. Supp.2d at 363-364. Officials refused to view the videotape of the incident, ignored grievances, lied to their superiors, and stonewalled efforts by outside agencies to investigate the abuses. *Id.* at 363-65. The abuse and cover-up were revealed only when numerous television stations broadcast the videotape months later; even then, the warden continued to maintain that it was merely a "training tape." *Id.* at 365.[6]

Similar examples abound of the type of egregious abuses that occur within prisons:

[6] *See also Swans v. City of Lansing,* 65 F. Supp.2d 625, 632-35, 650 (W.D. Mich. 1999) (judgment for estate of prisoner who died after guards beat him, noting "but for the video [tape of incident], there would have been no contradictory evidence to the testimony of the Defendants" and that the "City even tried to suppress or alter the Coroner's report").

--In Georgia, corrections officers testified about a mass beating in which riot guards punched, kicked and stomped on prisoners, stepped on their heads or smashed their heads into walls, and dragged a prisoner by his hair, while the Commissioner watched. Staff initially denied the facts of the incident out of fear of retaliation from other guards. *See* Rick Bragg, *Prison Chief Encouraged Brutality, Witnesses Report*, N.Y. Times, July 1, 1997.

--Guards at a District of Columbia jail forced female prisoners to engage in "sex shows including nude and semi-nude dancing" while guards watched, and ordered one prisoner to place a cigarette in her vagina. *Newby v. District of Columbia*, 59 F. Supp.2d 35, 37 & n.2 (D.D.C. 1999). A prisoner who refused to participate was beaten by staff. *Id.* at 36. The Court observed:

> What is particularly troubling is that these horrendous activities that took place at the City jail only surfaced when [the prisoners] complained about them. It is inconceivable how improper sexual activities involving the entire prison population of Southeast I, with inmates numbering between eight and one-hundred and three prison guards on duty as well as the presence of other prison guards from other parts of the prison could have occurred with no one putting an immediate stop to them.

Id.; see Women Prisoners of D.C. DOC v. D.C., 93 F.3d 910, 914, 929-31 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (earlier findings of rampant sexual abuse at D.C. jail and retaliation against those who complained).

--In 1995, staff at a federal prison in Florence, Colorado banded together to systematically beat prisoners whom they believed disrespected their authority. Mike McPhee, *Vigilante Guards May Do Time*, Denver Post, July 27, 2000, *at* http://www.denverpost.com/news/news0727.htm. One guard

admitted that staff would claim that the prisoner had attacked the guard, sometimes inflicting self-injuries to bolster the cover-up. By last summer, three officers reportedly had been convicted of criminal offenses for the set-ups. *Id.*

--In New York City, corrections officers engaged in a longterm pattern of severely beating prisoners in a jail segregation unit and falsifying reports to make it appear that the prisoners had attacked the officers. *Ex-Guard is Sentenced in Beating at Rikers*, N.Y. Times, April 5, 1997, at 27; Christopher Drew, *Rikers Island Guards Made 'House of Pain' for Inmates*, N.Y. Times, August 16, 1998, at A-1, 36. Cover-ups were routine: for example, an officer beat a prisoner and then faked an injury, rubbed carbon paper on his skin to simulate bruises, and upon orders of a captain, wrote a false report claiming the prisoner had attacked him. *Inmate Beatings Decrease, but Continue, at Rikers*, New York Times, March 1, 1997, at B-1; Drew, *supra*, at 36. The City settled a civil class action based on the excessive use of force with payment of $1.6 million (*Payment Offer in Rikers Abuse Suit*, N.Y. Times, February 15, 1996), and injunctive relief entered in 1998. *Sheppard v. Phoenix*, 91 Civ 4148 (RPP) (S.D.N.Y. 1998).

--In Georgia's juvenile detention centers, a 1997 investigation by the U.S. Justice Department revealed widespread patterns of excessive force and abusive discipline, inadequate procedures to investigate misconduct, and a systemic failure to report abuse. *See* U.S. Dept. of Justice, *Findings of Investigation of State Juvenile Justice Facilities*, *at* http://www.usdoj.gov/crt/split/documents/gajuvfind.htm.

Allowing prisons to conceal or cover up abuse only perpetuates abuse. Given the gravity of abuses in prison and the extraordinary lengths staff will go to keep them hidden, to condone the silencing of those who speak out against abuse is particularly dangerous. It is not sufficient that prisoners can

report abuse individually to outside correspondents if they cannot discuss it among themselves. Individual complaints of mistreatment are not likely to be taken seriously because of the impaired credibility of convicts and the status of prison staff as law enforcement personnel. And even when a prisoner's complaint is so serious or so undeniable that it must be heeded, the impulse of those in authority is to dismiss it as an aberration that does not reflect a larger problem. *See* Bandes, *supra*, at 1305-09. It is only when patterns of misconduct are unearthed that individual complaints are given due credence and the need for broader corrective measures is recognized. And those patterns will not be uncovered if prisoners are forbidden to speak among themselves of their experiences at the hands of their keepers.

C. Prisoners who complain about official misconduct face harsh sanctions from their jailers.

Prisoner complaints about staff misconduct are perceived by staff as direct challenges to their institutional authority. *See* Paul Chevigny, *Police Power* 136-38 (1969); Skolnick, *supra*, at 102; Haney, *supra*, at 93-94. This stems from the view underlying the "us vs. them" mentality that staff must be held blameless:

> The inmates and officials are two segregated strata. . . Modes of deference and obedience are expected by the officials, and expressions of authority are anticipated and tolerated by the inmates. . . . Through isolation the members of each group develop logically extreme positions. . . . [Thus] the custodians believe that they are 'always right' and that the prisoners are 'always wrong.'

Weinberg, *supra*, at 719-20. Thus prisons have traditionally punished harshly inmates who criticize misconduct by staff:

> An inmate who challenged the system and called attention to himself. . . would find himself on the coal pile for years, in isolation on a stringent diet, or salted away in segregation for an indefinite term. . . . More extreme was the punishment inflicted upon those few inmates who dared to directly challenge [the warden's] authority by complaining to the outside. . . [or] defying an officer. . . Such inmates could be expected to be beaten by the captains and lieutenants or by their specially selected inmate helpers.

Jacobs, *supra*, at 50, 203.

The most overt method of punishing criticism is express prohibition of complaints about staff. Until the Court struck down such rules in *Procunier v. Martinez*, 416 U.S. 396 (1974), prisons prohibited prisoners from "criticizing policy, rules or officials," or "belittling staff or our judicial system or anything connected with Department of Corrections." *Id.* at 415; *see* Jacobs, *supra*, at 50 (Stateville required letters be "respectful and decent in every way, containing no. . . remarks derogatory to the institution" and disciplined inmates "for the offense of criticizing Stateville"); Martin, *supra*, at 24 (Texas prohibitions on criticism to avoid "damaging publicity" and minimize "outside interference"); *Attica: The Official Report of the New York State Special Commission on Attica* 60 (Bantam Books 1972) (New York prohibitions on criticism).

Since then, prisons have pursued the same end through different means by retaliating against prisoners who complain or who reveal staff misconduct. Retaliatory measures include physical violence; transfers, denials of jobs, or other punishments; and pretextual disciplinary charges.[7] This use of

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[7] *See Hines v. Gomez*, 108 F.3d 265, 267-69 (9th Cir. 1997) (disciplinary charges filed in retaliation for exercise of First Amendment rights); *Cornell v. Woods*, 69 F.3d 1383, 1386-89 (8th Cir. 1995) (staff retaliation against prisoners who reported staff misconduct to internal affairs); *Newsom v. Norris*, 888 F.2d 371, 373, 375-77 (6th Cir. 1989)

"cover charges," well known from the police context (*see* Chevigny, *supra,* at 136-46; Bandes, *supra,* at 1333 n.362; HRW, *Shielded from Justice* at 20, 51), is particularly insidious in prison, since the many rules and restrictions of prison life provide innumerable possible false charges. Unlike the outside, there is almost never anyone but prisoners or guards who can refute such false allegations. The pervasive bias of the prison's internal disciplinary system against prisoners (*see Cleavinger,* 474 U.S. at 203-05), further erodes any likelihood that the guard's deception will be revealed.

An analysis by Human Rights Watch of staff sexual abuse of women prisoners in several states illustrates these phenomena: virtually every woman who complained of sexual abuse by staff was subjected to retaliation in the form of disciplinary cover charges, loss of good time credits, removal from programs, or prolonged periods of segregation. HRW, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 5-6, 43, 89, 95, 124, 155, 252-262, 313-14 (1996). Retaliation was directly linked to the bias of prison grievance systems. In almost every case, authorities assumed that the prisoner lied about the misconduct, and refused, absent medical reports or non-inmate witnesses, to credit prisoner testimony. *Id.* at 5, 91, 172, 252-56. Staff were reluctant to report misconduct

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(retaliation against inmate disciplinary assistants who complained about the disciplinary board chairman's performance); *Meriwether*, 879 F.2d at 1040, 1046 (prisoners transferred for being "outspoken critics of administration" and "corresponding with state officials and public interest organizations about the problems" at the prison); *Alnutt v. Cleary*, 27 F. Supp.2d 395, 397 (W.D.N.Y. 1998) (false disciplinary charges, assault, and faked positive drug test in retaliation for First Amendment exercise); *Castle v. Clymer*, 15 F.Supp.2d 640, 657, 663-67 (E.D. Pa. 1998) (retaliation for, *inter alia*, statements to newspaper reporter about prison); *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994) (retaliation and segregation for protected activity); *Feliciano v. Colon*, 704 F. Supp. 16 (D.P.R. 1988) (beating and tear-gassing of prisoner who complained to court).

observed in fellow staff. *Id.* at 156-57, 312-13. "Given the closed nature of the prison environment, and the reluctance of officers to testify against their peers" (*id.* at 5), complaints of sexual misconduct frequently went unredressed, and the complainants were punished. Indeed, in Michigan, virtually all women interviewed in connection with this HRW report and who complained about abuse were subsequently subjected to retaliatory abuse. HRW, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* (1998).

II. The First Amendment Does not Permit Prisons to Punish Prisoners Solely for Criticizing Official Misconduct.

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1034-35 (1991) (Kennedy, J., dissenting). Censorship of such speech is inimical to the fundamental principle that the people retain the "right of free public discussion of the stewardship of public officials," (*New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964)), even though such criticism "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and officials." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) (*quoting Sullivan*, 376 U.S. at 270); *see also Sullivan,* 376 U.S. at 269-270, 274-76. Prisons are not exempt from this principle, as "prison walls do not form a barrier separating prisoners from the protections of the Constitution." *Turner v. Safley,* 482 U.S. at 84.

A. The Court has never permitted prisons to impose content or viewpoint-based restrictions on prisoners' speech.

While the First Amendment permits substantial restrictions on prisoners' speech (*Turner,* 482 U.S. at 89), the

Court has *never* approved the sort of content and viewpoint-based punishment at issue here. Decisions limiting prisoners' free speech rights have consistently emphasized that they upheld general, content-neutral limitations.

In *Turner*, the Court upheld a blanket prohibition on non-legal correspondence between prisoners in different prisons, and emphasized that "the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression. *See Pell v. Procunier*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. [520], at 551 [1979]." *Turner*, 482 U.S. at 90; *see Bell*, 441 U.S. at 551 (affirming a rule permitting receipt of hardback books only from the publisher, emphasizing that "[t]he rule operates in a neutral fashion, without regard to the content of the expression").

Similarly, the Court upheld a regulation barring prisoners from receiving publications containing information deemed detrimental to prison security (*Thornburgh v. Abbott*, 490 U.S. 401, 404-05 (1989)), and explained that the government must advance a "legitimate *and* neutral" interest, that is, one "unrelated to the suppression of expression." *Id.* at 415. The regulation satisfied the standard since it distinguished between publications "solely on the basis of their potential implications for security"--and not, in other words, based on whether or not authorities agreed with the message. *Id.*

By contrast, in the only case in which the Court has reviewed non-neutral restrictions on speech, it struck them down.[8] In *Martinez*, the Court concluded, "Prison officials may

[8]In *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), the Court upheld various restrictions on the *associational* activities of a prison labor union, but was careful to note that "First Amendment speech rights are barely implicated in this case." *Id.* at 130. Although the restrictions precluded "bulk mailings" of union literature--i.e., large bundles of newsletters to be distributed by prisoners--prison officials permitted receipt of these publications when mailed to individual prisoners. *Id.* at 130 n.7, 131 n.8.

not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." 416 U.S. at 414. Thus the Court invalidated outgoing mail regulations banning letters that "'unduly complain' or 'magnify grievances,' express[] 'inflammatory political, racial, religious or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate'" (416 U.S. at 415), since these regulations "were decidedly not 'neutral'." *Abbott*, 490 U.S. at 416 n.14. In so doing, the Court identified the inherent danger in such rules, noting that "some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism." *Martinez*, 416 U.S. at 415. That is precisely what happened in this case.

B. Under the standard of *Turner v. Safley*, punishment of prisoner speech about official misconduct violates the First Amendment.

Prison restrictions on speech will be upheld if they bear a reasonable relationship to a legitimate and neutral governmental interest unrelated to the suppression of expression. *Turner*, 482 U.S. at 89; *Abbott*, 490 U.S. at 415. While this standard permits significant limitations on prisoners' speech rights (*see Abbott*, 490 U.S. at 404), the "reasonableness standard is not toothless." *Id.*, at 414. It would, however, become meaningless if the Court determined that prison officials may punish prisoners for exchanging information about abuse by prison guards in the absence of any finding of falsity or malice, and when the prison already determined that the communication did not disrupt security. *See infra* at 21.

Nothing in *Turner* or the Court's other prison First Amendment decisions permits this result.

1. The prison punished Respondent's speech solely because it criticized official misconduct.

The prison portrays this case as though it involved a generic ban on inmate-inmate correspondence, akin to the rules in *Turner*. But the prison did *not* ban inmate-inmate correspondence generally (Joint Appendix ("JA") 36-37; Brief of Petitioner at 6), nor did it ban inmate law clerks from writing to other inmates. Thus Mr. Murphy was not disciplined pursuant to a neutral rule, but rather was singled out for punishment exclusively because of the *content* of his speech. Since the prison persistently mischaracterizes the nature of these rules, we must clarify the actual regulations involved.[9]

Upon learning that Pat Tracy, another prisoner, had been criminally charged with assault on Officer Galle, Mr. Murphy wrote Mr. Tracy a letter describing other misconduct by Officer Galle. JA 50-51. This conduct--sexual advances towards prisoners and retaliation---would, if it occurred, violate prison rules and probably criminal laws.[10] The mail censor, Officer Shaw, read the letter. JA 52, 54, 57. There is no evidence that he forwarded the allegations of misconduct to his superiors, or that the prison investigated Mr. Murphy's complaints. Instead, Officer Shaw charged Mr. Murphy with

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[9]Mr. Murphy does not challenge the facial validity of the rules, other than on vagueness grounds, *infra* Point IV. Rather, he challenges these rules as applied to his particular communication with Mr. Tracy.

[10]Sexual abuse and harassment of prisoners by staff is a persistent problem. *See e.g. Mathie v. Fries*, 121 F.3d 808, 810-11 (2d Cir. 1997) (guard sodomized and harassed male inmate); *Downey v. Denton City*, 119 F.3d 381,384 (5th Cir. 1997) (female prisoner raped and impregnated by guard); *see generally* HRW, *Sexual Abuse, supra*.

three disciplinary infractions: "Insolence", "Interference with Due Process Hearings," and "Conduct Which Disrupts or Interferes With the Security or Orderly Operation of the Institution." JA 14-15 52, 54, 57. Mr. Murphy was found guilty of the first two charges. However, he was acquitted of the interference with security charge. JA 59-62.

The disciplinary charges that were sustained make clear that discipline was based exclusively on the *contents* of the letter. The "Insolence" violation charged:

> DESCRIPTION OF ALLEGED VIOLATIONS: While routinely monitoring Institutional mail, I (CS Shaw) noticed statements in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an overzealous guard who punishes and harasses inmates for personal pleasure. Inmate Murphy also accused CO Galle of making homosexual advances towards inmates. Inmate Murphy stated that CO Galle retaliated against Murphy by writing him up on two rule infractions. [JA 52].

The hearing officer sustained the charge on the grounds that "Evidence states C/O Galle retaliated against Murphy by Issuing Inmate Murphy a Class II infraction. That statement indicates unprofessional actions which tend to intimidate the employee." JA 60.

The charge for "Interference with Due Process Hearings" read:

> DESCRIPTION OF ALLEGED VIOLATION: While routinely monitoring institutional mail I (CS Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter Murphy tries

> to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to 'do something' about CO Galle, but he (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact. [JA 54].

The hearing officer sustained the charge on different grounds: "The statement referring to C/O Galle making homosexual advances to another inmate would result in disciplinary action against stated employees of the DOC." JA 62.

Plainly, these charges are not grounded in any general ban on inmate-inmate correspondence, nor the rules of the law clerk program. Mr. Murphy's only wrongdoing, in the prison's eyes, was to discuss an officer's misconduct in an otherwise-lawful communication.

2. Punishment on this basis is not rationally related to a neutral, legitimate government interest.

Under *Turner*, the prison's punishment is not reasonably related to "legitimate and neutral" governmental objectives, and is instead an exaggerated response to the prison's concerns. The prison advances three interests in support of the discipline: protecting officers from learning of prisoner complaints about their misconduct; preventing prisoners from communicating information about official misconduct that may be relevant to a court proceeding;[11] and maintaining security.

First, in the disciplinary proceedings, the prison defended the discipline based on its interest in preventing

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[11]We address this interest in Point III, *infra*.

officers from hearing prisoner's allegations of misconduct, finding that Mr. Murphy's letter alleged "unprofessional actions which tend to intimidate the employee" (JA 60) and conduct that, if true, would subject the guard to discipline. JA 62. This turns the notion of a "legitimate" objective on its head, for the government has *no* legitimate interest in permitting an employee to escape disciplinary action where misconduct has occurred. "Criticism of [a government officer's] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Sullivan*, 376 U.S. at 273. Yet this is essentially what prison officials urge here--that the Court approve of their interest in suppressing allegations of staff misconduct.

It is dubious at best whether the prison has a legitimate interest in protecting prison staff from derogatory communications about themselves. Law enforcement and other government officials must be prepared to tolerate even harsh and strident criticism. *See Houston v. Hill*, 482 U.S. 451, 461 (1987) ("the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," including speech that is "provocative and challenging"); *see also Sullivan*, 376 U.S. at 273 ("If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials."). While such comments, if made face to face, may present a risk of disorder in the sometimes volatile atmosphere of a prison, no such danger is presented when a prison staff member simply reads a letter in the ordinary course of a monitoring scheme. Moreover, at bottom, this governmental objective is aimed at suppressing speech, however much defendants talk about its effects on the listener rather than the speaker. As such, it is precisely the type of *non-neutral* objective "related to suppression of expression" that does *not* permit limitations on speech. *See supra* at 18.

But even if the prison had a legitimate interest in protecting officers from hearing prisoners' complaints, imposing discipline on *any* prisoner speech critical of an officer is an exaggerated response to that concern. It sweeps far too broadly, censoring speech that the officer may never, or need never, hear. Here, the critical speech was not made to or in the hearing of Officer Galle, but rather was sent in a private letter intended to be read only by the prison censor and Mr. Tracy. As the Ninth Circuit correctly noted, the "easy, obvious" alternative way for the prison to protect the officer from a complaint is simply not to tell him about it. Appendix to Petition for Certiorari ("Cert. App.") 14.

Second, the prison maintains that the discipline was reasonably related to its general interest in security. The prison relies almost exclusively on *Turner's* approval of a ban on inmate-inmate correspondence for security reasons. But this is misplaced, for there was no such ban here. Yet the only record evidence on "security" discusses the "Inmate Correspondence Policy" (the generic rule permitting the prison to review and censor certain mail), which is *not* at issue here since Mr. Murphy was not charged with violating that policy and it does not prohibit the conduct in which he engaged.[12] The issue is whether legitimate security concerns permit punishing Mr. Murphy under the Insolence and Due Process rules *because his*

[12]The Magistrate Judge below concluded that the prison had not shown a rational relationship between the discipline and a legitimate penological objective. Cert . App. 39. The prison then submitted the affidavit of Warden Mahoney, which states that the "Inmate Correspondence policy" (Policy 16-001, JA 34-49) furthers security by permitting the facility to review prisoner mail to prisoners in maximum security. JA 96-97. The district court, in rejecting the Magistrate's report, summarily concluded that "there is a valid, rational connection between the inmate correspondence policy and the objectives of prison order, security and inmate rehabilitation,"(Cert. App. 25), without noticing that the policy was not at issue.

letter was critical of authorities. The prison adduced *no* evidence demonstrating how such punishment was related to legitimate security interests.[13]

Nor can the prison make this showing, for punishing a prisoner for peaceful speech that criticizes an officer, without any showing that the speech is false or malicious, is an exaggerated response to legitimate security interests. The prison does not suggest that there is a direct threat to security from all prisoner reports of staff misconduct; indeed, reporting of misconduct would appear to be essential to ensuring the accountability of staff and the integrity of the institution.

The concerns over the content of critical speech are thus qualitatively different from the prison's legitimate concerns over speech that is genuinely hazardous to security, such as escape plans or illegal activity. The prison is entitled to impose reasonable time, place and manner restrictions on speech in general, including complaints about official misconduct, in order to ensure order and security. But this prisoner voiced his concerns peacefully in a letter not directed either to the offending guard, or to anyone other than Mr. Tracy, and not in violation of prison correspondence rules. The prison does not suggest that this mode of delivery threatened security any more

[13]This is in stark contrast to the evidence adduced in *Turner* establishing the connection between legitimate security concerns and the ban on non-legal inmate-inmate correspondence there. At the trial in *Turner*, the state presented evidence of a growing and significant problem with gang activity, the specific needs of the facility since it was designated to house protective custody inmates, and the manner in which the limitations on correspondence were connected to these security concerns. 482 U.S. at 91. The state also adduced evidence of the potential harmful effects of permitting such correspondence, and demonstrated how the correspondence directly threatened the core interests of maintaining safety. *Id.* at 92. There has been *no* analogous showing here of any relationship between security and punishment of speech about abuse by prison staff.

than had Mr. Murphy delivered the same message in another manner, such as simply talking with a prisoner. A complete prohibition on speech that, in and of itself, poses no cognizable security threat, is an exaggerated response to concerns over maintaining order.

III. The Punishment Violated the First Amendment Right to Engage in Speech Concerning Litigation.

The Ninth Circuit held that Mr. Murphy, as a law clerk designated by prison officials, had a First Amendment right to assist Mr. Tracy with his pending legal matter. This is correct, though the emphasis on his status as a law clerk is unnecessary. Any prisoner who had information relevant to Mr. Tracy's defense had a right to communicate it to him, absent a neutral, non-content-based rule prohibiting the correspondence.

This right is not necessarily grounded on a right of court access, recently addressed by this Court in *Lewis v. Casey,* 518 U.S. 343 (1996). Mr. Murphy asserted a court access claim, but the appeals court did not rule on it. Cert. App. 15. Rather, our analysis rests on the more general right to freedom of speech, which protects speech about litigation just as it does speech about any other subject. *See Rizzo v. Dawson,* 778 F.2d 527, 531 (9th Cir. 1985), *citing NAACP v. Button*, 371 U.S. 415 (1963). Mr. Murphy's exercise of that right in connection with Mr. Tracy's pending case is therefore protected in the same manner as would be, e.g., stating his support for a Presidential candidate or his opposition to a legislative proposal. That point is especially pertinent given the nature of his communication. He was not purporting to draft legal papers, perform legal research, or advocate for Mr. Tracy; he merely offered information that he believed relevant to Tracy's defense.

There is an important difference between a claim about speech concerning litigation and a claim about access to courts.

The right of access to courts enjoyed by persons the state has incarcerated, as explicated by this court in *Lewis v. Casey,* places an affirmative obligation on the state to assist those persons who have non-frivolous legal claims related to their incarceration in presenting those claims to courts.[14] The more general right of free speech extends to all persons and all subjects, but places no obligation on government to assist the speaker. It is that aspect of the free speech right that was abridged by the prison officials in this case.

The Court of Appeals correctly concluded that, under *Turner,* the discipline of Mr. Murphy was not rationally related to a legitimate, neutral government objective. The court did not rely significantly on his status as a law clerk in this analysis, but rather, it focused on the nature of the communication and the risks it allegedly posed to the prison's interests. It observed that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." Cert. App. 12. Mr. Murphy had no other way to communicate to Mr. Tracy the information he had for Mr. Tracy's defense counsel. There would be no impact on prison staff, other prisoners, or prison resources from delivering that correspondence, and certainly none from refraining from punishing him for it; he does not dispute the prison's right to read such correspondence and intercept it if it contains matter that is genuinely hazardous to legitimate penological interests. Such monitoring imposes no additional burden on prison officials. Cert. App.13-14. The easy, obvious alternative to protect staff from derogatory communications about themselves is to have the correspondence read by someone else -- as they already do. Cert. App.14.

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[14]There is a broader right of all persons to be free of governmental obstruction of their access to courts. *Ryland v. Shapiro,* 708 F.2d 967, 971 (8th Cir. 1983), *citing Chambers v. Baltimore & Ohio R.*, 207 U.S. 142, 148 (1907). That right is not at issue in this case.

In that context, Mr. Murphy's law clerk status only buttresses the appeals court's conclusion. It shows that the prison saw no need to bar prisoners from helping each other with legal matters, and indeed that Mr. Murphy was a person whom they deemed qualified, and assigned, to engage in precisely that sort of communication. Along with the fact that the prison did not prohibit other correspondence with prisoners in the high security compound, these facts show that nothing about Mr. Murphy's communication presented any threat to legitimate prison management concerns.

IV. The Punishment of Respondent Denied Due Process Since the Rules Do Not Give Adequate Notice That They Forbid Speech about Staff Misconduct.

The discipline of Mr. Murphy also denies due process because the rules under which he was disciplined are impermissibly vague as applied to his conduct, and thus fail to give "fair notice to those to whom [they are] directed." *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (citations omitted).[15] The vagueness doctrine serves to

> eliminate the impermissible risk of discriminatory enforcement [citations omitted], for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred. . . but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.

Gentile, 501 U.S. at 1050; *accord Reno v. American Civil*

[15]Mr. Murphy alleged that the rules were vague as applied to his conduct, but the Ninth Circuit did not reach this question, concluding only that the regulations were facially valid. Cert. App. 15-16.

Liberties Union, 521 U.S. 844, 871-72 (1997).[16]

Both rules invoked to punish Mr. Murphy fail on these grounds. First, the prison relied upon the insolence rule, which forbids "words, actions or other behavior which is intended to harass or cause alarm in an employee" and "cursing; abusive language, writing or gestures directed to an employee." JA 10. But Mr. Murphy's statements were not "directed to" Officer Galle; rather, they were made in a private letter to Mr. Tracy, intended to be read only by Mr. Tracy and the prison mail censor. He could not have known that statements made entirely out of earshot and view of Officer Galle would be deemed insolence. Nor is there any evidence that they were "intended to harass or cause alarm" in Officer Galle.[17] JA 59, 61. The prison's expansive view of the regulation would mean that any time a prisoner complained about a corrections officer to *anyone*, he would be deemed "Insolent."

The prison also concluded that Mr. Murphy violated the rule against "Interference with Due Process Hearings." JA 61. That rule prohibits "Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff which could result in a disciplinary violation."

[16]Although the Court has applied the vagueness doctrine less rigorously outside the context of criminal law, *see NEA v. Finley*, 118 S. Ct. 2168, 2179 (1998), the penalties imposed in prison, such as isolated punitive confinement, are "more akin to criminal rather than civil penalties." *Chatin v. Coombe*, 186 F.3d 82, 86 (2d Cir. 1999).

[17]The evidence against Mr. Murphy on both counts consisted solely of the infraction reports, JA 52, 54; Mr. Murphy's letter, JA 50; and his written statements, JA 59, 61. *See* JA 59, 61. None of these documents display any indication of intent to harass or cause alarm in Officer Galle (or any evidence that Mr. Murphy's statements were false).

JA 22. The prison contends that he violated the rule in two respects: by providing information to Mr. Tracy with respect to his court hearing (JA 54); and by stating that Officer Galle had retaliated against him and sexually harassed prisoners. JA 62.

Nothing in the rule notifies prisoners that it forbids exchanging relevant information about pending court cases. The rule appear to be addressed exclusively to internal proceedings, but even if it is not, it simply cannot be the basis for Mr. Murphy's discipline, as he had no way to know his letter to Mr. Tracy would violate this rule.

Nor can Mr. Murphy's statements be punished under the other prong of the rule, which prohibits "making a false statement of misconduct" against a staff member. Even in a prison disciplinary proceeding, there must be "some evidence" to support the charges. *Superintendent v. Hill*, 472 U.S. 445, 457 (1985).[18] There is no evidence whatsoever that Mr. Murphy's statements were false or malicious. *See* n.17, *supra*. Thus, the discipline imposed on Mr. Murphy is unconstitutional regardless of the Court's resolution of the substantive First Amendment issues presented.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[18]It is doubtful that "some evidence" would suffice, even in prison, to support punishment for speech addressing about official misconduct. *See New York Times v. Sullivan*, 376 U.S. at 285-86 (requiring "convincing clarity" and showing of actual malice to support defamation finding against public official). However, in this "no evidence" case, the Court need not reach the question.

Respectfully submitted,

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